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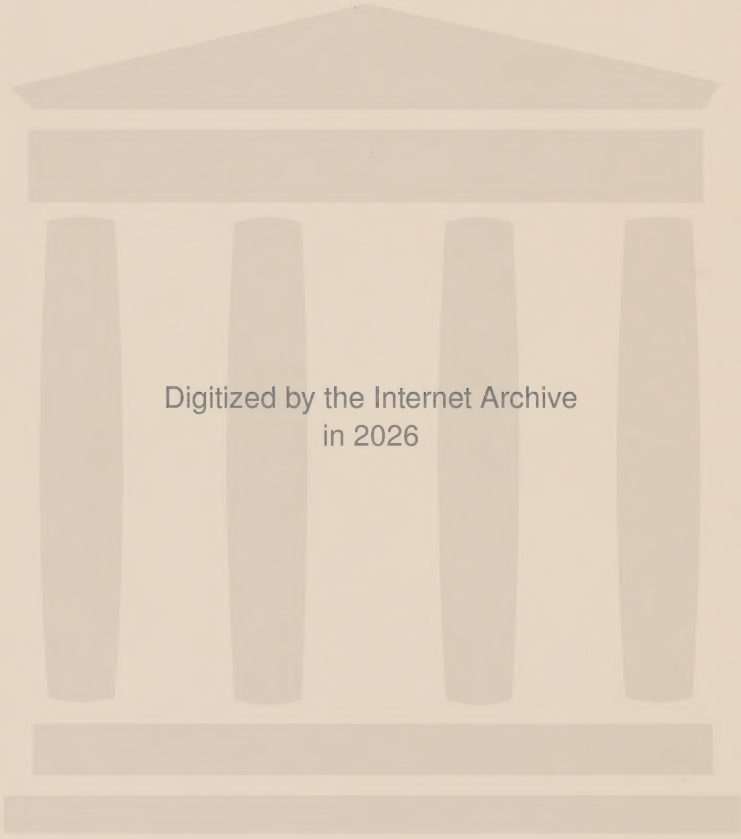

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32	footnote (2)	Doug.	1 Doug.
125	2	Judicature Act	Conveyancing Act, 1881.
163	5	1903	1893
232	footnote (1)	should be repeated on p. 237 as a note to sentence ending with word "failed," line 10 from bottom.	
377	21 and 22	should read "than the living children."	
378	24	should read "Underhill and Strahan."	

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

HOWATSON *v.* WEBB.

C. A.
1907
Oct. 25.

[1906 H. 1588.]

Deed—Misrepresentation as to Contents—Plea of Non est factum.

The defendant, a solicitor, who was formerly a managing clerk to one H., acted as his nominee in a building speculation relating to certain property at E. of which H. was the owner. Shortly after leaving H.'s employment he was requested by H. to execute certain deeds, and on asking what those deeds were he was told by H. that they were deeds transferring the E. property. The defendant thereupon signed them. One of the deeds so signed was a mortgage between the defendant, as mortgagor, of the one part and W. of the other part, and contained the usual covenant by the mortgagor for payment of principal and interest. In an action by a transferee of the mortgage for payment of the principal debt and interest the defendant pleaded non est factum:—

Held (affirming the decision of Warrington J., [1907] 1 Ch. 537), that, the misrepresentation being only as to the contents of a deed known by the defendant to deal with the property, the plea failed, and that the defendant was liable on the covenant.

Dictum of Swinfen Eady J. in *Bagot* v. *Chapman*, [1907] 2 Ch. 222, 227–8, doubted.

Quære whether the old authorities on the plea of non est factum extend beyond cases where the party is blind or illiterate.

THIS was an appeal of the defendant Webb from a decision of Warrington J. (1)

The facts appear sufficiently from the head-note and from the report of the case in the Court below.

(1) [1907] 1 Ch. 537.

C. A. 1907 HOWATSON v. WEBB.

Herbert Jacobs, for the defendant Webb. There was here a misrepresentation by Hooper to the appellant as to the character and nature of the deed. The appellant was thereby induced to believe that this was a deed transferring the property back to the beneficial owner, whereas it was in fact a mortgage containing a personal covenant to pay. That is a sufficient misrepresentation to support the plea of non est factum.

[FLETCHER MOULTON L.J. The cases collected in Comyns' Digest, vol. iv. pp. 264, 265, tit. Fait (B), obviously all refer to illiterate men. Is there any case which extends this doctrine to an educated man ?]

There is no rule of law that a misstatement as to the nature of a deed made to an educated man, who without any negligence on his part does not read the deed, is of no effect and that he is bound by it: *Foster* v. *Mackinnon*. (1)

Further, assuming that the plea of non est factum cannot be established as to the whole deed, it is nevertheless good as to the covenant to pay. A personal covenant to pay is not a necessary incident of a mortgage, and, although the covenant to pay and the mortgage are on the same parchment, they ought to be treated as separate instruments, and the plea may be good as to the one and bad as to the other: per Swinfen Eady J. in *Bagot* v. *Chapman*. (2)

[FARWELL L.J. That dictum was obiter only, and, with great respect to the learned judge, I have grave doubts as to the correctness of his reading of *Pigot's Case*. (3)

COZENS-HARDY M.R. I think that every member of the Court is quite clear that this is one deed, and not two.]

Norton, K.C., and *Wright Taylor*, for the plaintiff.

J. S. Green, for the original mortgagee.

COZENS-HARDY M.R. In my opinion there is no ground for interfering with the judgment of Warrington J. The law as stated by him as to the plea of non est factum appears to me to be stated with absolute accuracy, and to be based on decisions of

(1) (1869) L. R. 4 C. P. 704. (2) [1907] 2 Ch. 222, 227-8.
(3) (1614) 11 Rep. 26b.

this Court which are binding on us, and I think it would be a waste of time if I were to do more than say that I accept and approve of every word of his judgment. As stress has been laid upon certain observations of Swinfen Eady J. in *Bagot* v. *Chapman* (1)—observations which were in no way necessary to the decision of that case—I think it better to say that as at present advised I am not prepared to assent to all that he has said upon the question of severability. If the mortgage is good at all, I cannot conceive that it can be right to say it is not good in all respects and is not good as regards the personal covenant to pay. The appeal must be dismissed.

FLETCHER MOULTON L.J. I agree. I will only add that I cannot myself believe that a solicitor could have signed this deed without knowing that, though it may have been described simply as a transfer of property, it was in fact a transfer of property by way of mortgage. If he did not choose to examine whether this transfer by way of mortgage contained a personal covenant to pay, or if, as is more probable, he never thought of the point at all, that is not a matter that can affect the consequences of his signing it.

FARWELL L.J. I am of the same opinion. Warrington J. has expressed my view of the law thus (2) : "If a man knows that the deed is one purporting to deal with his property and he executes it, it will not be sufficient for him, in order to support a plea of non est factum, to shew that a misrepresentation was made to him as to the contents of the deed. The deed in the present case is not of a character so wholly different from that which it was represented to be as to come within the principle within which Lord Hatherley held that the case before him"—*Hunter* v. *Walters* (3)—"did not fall." I think myself that the question suggested, but not decided, by Mellish L.J. in that case will some day have to be determined, viz., whether the old cases on misrepresentation as to the contents of a deed were not based upon the illiterate character of the person to whom the deed was

(1) [1907] 2 Ch. 222, 227–8. (2) [1907] 1 Ch. 547–8.
(3) (1871) L. R. 7 Ch. 75.

C. A. 1907 HOWATSON v. WEBB. Farwell L.J.

read over, and on the fact that an illiterate man was treated as being in the same position as a blind man: see *Thoroughgood's Case* (1), and Sheppard's Touchstone, p. 56; and whether at the present time an educated person, who is not blind, is not estopped from availing himself of the plea of non est factum against a person who innocently acts upon the faith of the deed being valid. I agree that the appeal ought to be dismissed.

COZENS-HARDY M.R. I quite assent to the observations which have fallen from Farwell L.J.

Solicitors: *Bate & Co.; Wordsworth, Blake & Co.; E. F. Champion, for Watson & Everitt, Lowestoft.*

H. B. H.

C. A. 1907 *Nov.* 1.

In re SALAMAN. DE PASS *v.* SONNENTHAL.

[1907 S. 528.]

Will—Construction—Bequest to a Class of Children "born" previously to Date of Will—Child en ventre sa mère.

There is a general rule of construction that, in the absence of a contrary intention, a gift by will to children "living" or "born" at a given period includes a child en ventre sa mère at that date, and born afterwards, in any case where the application of the rule is for the benefit of the child.

A testator, by his will, gave to each of his great-nephews and great-nieces "born previously to the date of this my will," to whom no other pecuniary bequest was given by his will or any codicil thereto, the sum of 500*l.*, and he made two codicils to his will:—

Held, that a great-niece en ventre sa mère at the date of the will and of the codicils and born afterwards was entitled to a legacy.

Decision of Kekewich J., [1907] 2 Ch. 46, reversed on this point.

APPEAL by Daphne Salaman against a decision of Kekewich J. (2) so far as it related to the question whether the appellant was entitled to a legacy of 500*l.*

By his will dated October 17, 1904, Nathaniel Salaman gave

(1) (1582) 2 Rep. 9a. (2) [1907] 2 Ch. 46.

numerous specific and pecuniary legacies, including the following: "To Herbert Nathaniel Davis, the son of my niece Isabel Davis, the sum of 700*l.* To my great-niece Mabel Eltlinger the sum of 500*l.* To each of my great-nephews and great-nieces (children of my nephews and nieces) born previously to the date of this my will, to whom no other pecuniary bequest is given by this my will or any codicil thereto, the sum of 500*l.*" The testator made two codicils to his will, and he died on April 19, 1905.

One of the testator's great-nieces was the appellant, who at the date of the will and of the two codicils was en ventre sa mère, and was not born till March 14, 1905.

Kekewich J. held that she was not entitled under the above bequest.

Younger, K.C., and *H. Burrows*, for the appellant. The authorities have established a rule of construction which for many purposes treats a child en ventre sa mère and born afterwards as already born, and, where it operates for the benefit of the child, the scope of the rule, as laid down by the Court of Appeal in *Villar* v. *Gilbey* (1), is in no wise affected by the judgments of the House of Lords in that case. (2) There is nothing in the language of this will to exclude the operation of the rule. It was obviously for the benefit of the appellant that she should take this legacy, and she was clearly within the reason and motive of the gift.

Jessel, K.C., and *W. H. Draper*, for the respondents, the residuary legatees. The meaning of the decision in the House of Lords is not that this arbitrary rule of construction applies wherever it is for the benefit of the child, but that the Court ought not to depart from the natural construction of words having a plain meaning unless it is obliged to do so.

[FARWELL L.J. It is not an arbitrary rule; it takes away the primary construction, and adopts a secondary construction in order to effectuate the testator's intention.]

Trower v. *Butts* (3) shews how very narrow the rule there is.

(1) [1906] 1 Ch. 583. (2) [1907] A. C. 139.
(3) (1823) 1 S. & S. 181.

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[FLETCHER MOULTON L.J. referred to *Blasson* v. *Blasson*. (1)]

The view of the Lord Chancellor in *Villar* v. *Gilbey* (2) was that this rule ought not to be extended, but here the Court is being asked to extend it. In all the cases where the doctrine has been applied the gift has been to children born or living at some future date—either at the testator's death or at some later period; in no case has it ever been applied to children born at the date of the will.

[FLETCHER MOULTON L.J. So far as the testator's intention is concerned, it is immaterial whether the testator says the children are to be born at the date of his will or born at the time of his death.]

Further, there is here a contrary intention on the face of the will. The language of this bequest, which is limited to persons not otherwise provided for by the testator, points to a class of persons of whose existence the testator was aware.

COZENS-HARDY M.R. (after reading the bequest and stating the facts). The whole law on the subject of the position in point of construction of a child en ventre sa mère received great consideration in the recent case of *Villar* v. *Gilbey*. (3) In the Court of Appeal, to whose decision I was a party, it was held that there was a general rule of construction as to a child en ventre sa mère, and that that rule applied even though the effect of its operation in the case before us was to cut down a gift from an estate tail to a mere life estate. Our view was that the rule applied without regard to the consideration whether its application was or was not for the benefit of the child. That view was reversed by the House of Lords in that particular case, but, having read with great care and attention the judgments in the House of Lords, I see no reason to suppose that they in any way qualified the view of the Court of Appeal in any case in which that rule defined in the way suggested by that Court would operate for the benefit of the child. I do not much like referring to my own judgments, but it will shorten matters if I refer to a passage in which I say (4): "In short, it cannot now be questioned that

(1) (1864) 2 D. J. & S. 665.
(2) [1907] A. C. 139.
(3) [1906] 1 Ch. 583; [1907] A. C. 139.
(4) [1906] 1 Ch. 594.

under a devise or bequest to the child of X., or to the children of X. as a class living or born at a particular time, a child en ventre sa mère at the time and afterwards born alive is a child entitled under the devise or bequest." I think there is not a word in the judgments of the House of Lords indicating the smallest dissent from that proposition. Nay, I think it is affirmed in language which admits of very little doubt. In *Trower* v. *Butts* (1), which was decided by Leach V.-C. in 1823, the gift was to all the children of a nephew of the testatrix born in her life-time, and referring to that decision Lord Loreburn L.C., after pointing out that a posthumous child was there held to be entitled, said (2): "As I read that case the Vice-Chancellor so decided on the ground that this construction was for the child's benefit." Then he goes on: "The other case is *Blasson* v. *Blasson* (3), in which similar words occurred, and Lord Westbury L.C. upheld the case of *Trower* v. *Butts* (1) on the ground I have just mentioned, and spoke of 'this peculiar rule of construction which is limited to cases where such construction of the word "born" is necessary for the benefit of the unborn child.'"

Now, applying that passage to the present case, is it possible to doubt that it falls within the rule? The gift is "To each of my great-nephews and great-nieces born previously to the date of this my will, to whom no other pecuniary bequest is given by this my will or any codicil thereto." There is no context to help us in this will; there is no contrary intention indicated. I see no ground for the suggestion which has been put forward that this rule only applies to a class of children to be ascertained at some future date as distinguished from a class of children born at the date of the will. For these reasons I think that we should be acting in contravention of the plain authority of the House of Lords if we did not hold this child to be entitled. The appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion. In my view the House of Lords in *Villar* v. *Gilbey* (4) authoritatively supported the decision of Lord Westbury in *Blasson* v. *Blasson* (3)

(1) 1 S. & S 181.
(2) [1907] A. C. 145.
(3) 2 D. J. & S. 665.
(4) [1907] A. C. 139.

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and of Leach V.-C. in *Trower* v. *Butts.* (1) On turning to *Blasson* v. *Blasson* (2) I find from the marginal note that Lord Westbury is reported to have decided "that a child in ventre sa mère is only to be treated as a born child where such construction is necessary for the benefit of that child." That, in my opinion, accurately summarizes the judgment, except that I should prefer to put it that a child en ventre sa mère is to be treated as a born child in those cases where it is for the benefit of the child. Looking at the reasoning of the opinions given in the House of Lords in *Villar* v. *Gilbey* (3), and looking at the reasoning of Lord Westbury and Leach V.-C. in the other case to which I have referred, I can find nothing which induces me to think that those decisions turned in any way on the particular date at which the gift was given or at which the class was to be determined. It is said on behalf of the respondents that we ought to give a different meaning to the word "born" when the gift is to children born at the date of the will from that which we should do if the gift were to children living at the date of the testator's death. I can see no reason for doing so, and no countenance in the cases for that view. I am therefore of opinion that this case is concluded by authority, and that this appeal should be allowed.

FARWELL L.J. I agree. Whatever may be the meaning of the word "born" in ordinary parlance, a rule of construction has been established which was stated forty-four years ago by Mr. Vaughan Hawkins, in my opinion with absolute accuracy, in his admirable treatise on Wills, in these terms (p. 79): "RULE. A devise or bequest to children '*born*' or to children '*living*' at a given period, includes a child en ventre at that period, and born afterwards." For that he cites *Doe* v. *Clarke* (4) and *Trower* v. *Butts.* (1) Then he gives the reason for the rule and adopts the language of Leach V.-C.: "'It is now fully settled, that a child en ventre sa mère is within the intention of a gift to children *living* at the death of a testator; not because such a child (and especially in the early stages of conception) can

(1) 1 S. & S. 181.
(2) 2 D. J. & S. 665.
(3) [1907] A. C. 139.
(4) (1795) 2 H. Bl. 399.

strictly be considered as answering the description of a child living; but because the potential existence of such a child places it plainly within the reason and motive of the gift.'" Then he goes on, still quoting from the Vice-Chancellor, "Upon the whole, I am of opinion that, inasmuch as it is adopted as a rule of construction, that a child en ventre sa mère is within the intention of a gift to children living at the death of a testator, because plainly within the reason and motive of the gift; so a child en ventre sa mère is to be considered within the intention of a gift to children *born* in the life-time of a testator, because it is equally within the reason and motive of the gift." The basis of the rule is that "the potential existence of such a child places it within the reason and motive of the gift." The rule certainly applies to a class of great-nephews and nieces. Therefore the only argument available to the respondents is that there is a contrary intention to be found in the words "born previously to the date of this my will, to whom no other pecuniary bequest is given by this my will, or any codicil thereto." I can see nothing in these words to suggest an intention to exclude from the reason and motive of the gift a child who happens to be en ventre sa mère at the date of the will, and I am unable to agree with Kekewich J. that they import "persons of whose existence I know"; nor do I follow his observations that the testator was referring to persons to whom he might have given a pecuniary bequest. The will refers to future bequests by codicil as well as to gifts by will, and there is nothing to shew that he was referring only to then existing legatees in a sentence referring to future as well as to existing legatees.

Solicitors: *McKenna & Co.*

H. B. H.

C. A.
1907
Nov. 8.

JENKINS *v.* PRICE.

[1907 J. 348.]

Landlord and Tenant—Lease—Covenant against Assignment without Consent unless unreasonably withheld—Covenant to reside upon the Premises and personally carry on Business of Licensed Victualler thereon — Assignment to Limited Company carrying on a Brewery Business—Demand for increased Rent as Condition of Consent—Conveyancing and Law of Property Act, 1892 (55 & 56 *Vict. c.* 13), *s.* 3.

By a lease of an hotel the lessee covenanted (1.) not to assign without the previous consent of the lessor, unless such consent should be unreasonably withheld; (2.) at all times during the term to reside upon the hotel and personally carry on the business of a licensed victualler thereon. The lessee asked permission to assign to a limited company which carried on a brewery business. The lessor, being of opinion that an assignment to brewers would depreciate the goodwill, gave an unconditional consent to the assignment to a private person, but required as a condition of giving his consent to an assignment to a brewery firm that the rent should be increased and the term of the lease extended. In an action by the lessee for a declaration that the lessor was not entitled to impose such terms as a condition of giving his consent, Swinfen Eady J. (whose attention was not called to the covenant as to personal residence) held that the objection of the lessor was not in itself unreasonable, but that the lessor was acting contrary to s. 3 of the Conveyancing Act, 1892, in attempting to insist upon an increased rent as a condition of giving his consent, and he declared that the lessee was entitled to assign to the company without any further consent. The lessor appealed:—

Held, without expressing any opinion upon either of the points decided by the Court below, that, having regard to the covenant as to personal residence, the lease could not be assigned to a limited company.

Appeal from a decision of Swinfen Eady J. (1)

By a lease dated April 8, 1905, the London Hotel, Abergavenny, was demised to the plaintiff, Miss Jenkins, for a lease of fourteen years from December 25, 1904, at a rent of 100*l*. The lessee covenanted that she would not (except by will) assign, transfer, underlet, or part with possession of the said hotel without the previous consent in writing of the lessor, unless such consent should be unreasonably withheld; and also that she would at

(1) [1907] 2 Ch. 229.

all times during the said term reside upon the said hotel, and personally carry on the business of a licensed victualler thereon, so long as the necessary licences could be procured, or until the same premises should be assigned or underlet as aforesaid. The lease also contained a clause of re-entry on breach of the covenants.

In 1906 the lessee was desirous of assigning to the Rhymney Iron Company, Limited, which in addition to its iron business carried on a brewery business, and she asked the lessor's permission to the assignment. The lessor was unwilling that the house should be tied to any brewery, on the ground that the goodwill would be thereby depreciated, and, although he was willing to agree to an assignment to a private person who would carry on the business as a free house, he declined to consent to an assignment to a brewery firm except upon the terms that the rent should be increased by 25*l.* and the term of the lease extended from twelve to twenty-one years. Thereupon the lessee brought this action for a declaration that the lessor was not entitled to impose such terms as a condition of giving his consent, and that the lessee was entitled to assign to the brewery company without any further consent.

In the Court below the covenant as to personal residence was not brought to the notice of the learned judge.

Swinfen Eady J. thought that the objection to consent to an assignment to a brewery company was not in itself unreasonable, but he held that the defendant, in attempting to insist upon an increase of rent as a condition of giving his consent, was acting contrary to s. 3 of the Conveyancing Act, 1892, which provided that no fine or sum of money in the nature of a fine should be payable in respect of such consent. He therefore made the declaration asked for by the plaintiffs.

The defendant appealed.

Micklem, K.C., and *T. T. Method*, for the defendant. The defendant's objection to an assignment to a brewery company is not unreasonable, because the company would immediately put in a manager and run the house virtually as a tied house, and the effect of that would be to depreciate the value of the goodwill.

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The learned judge found in our favour as to this. He thought, however, that the defendant was acting contrary to s. 3 of the Conveyancing Act, 1892, but that section does not apply to a case like this. Moreover, a limited company is incapable of complying with the covenant as to personal residence.

[FARWELL L.J. If you had taken the objection that you required the personal residence of the tenant you would have been on firmer ground, but you have not done so.]

In substance our objection comes to that.

[COZENS-HARDY M.R. There being a good ground of objection, you never took it in the Court below. Can you now fall back on it?]

The Court will not sanction an assignment to a limited company when it is plain that no limited company can comply with the terms of the lease.

Eve, K.C. (with him *James Corner*), for the plaintiff. Although a lessor may refuse to consent to an assignment without giving any reason, if he has a good reason, yet if he gives a reason which is a bad one the Court is entitled to say that his objection is unreasonable. Here the objection which was actually taken was not a good one.

COZENS-HARDY M.R. This is a very unfortunate case. Upon looking at the lease, it is in my opinion too plain for argument that there is a covenant that the lease shall not be assigned to a limited company. Those are not the actual words of the covenant, but the words which are used mean that with perfect plainness. The lessee covenants that she will not assign without the consent of the lessor unless such consent should be unreasonably withheld, and also that she will reside on the premises and personally conduct the business. It is obvious that a limited company cannot perform that covenant, and yet the judgment under appeal declares that the lessee is entitled to assign to a limited company. Through some inadvertence, neither in the pleadings nor in the argument in the Court below, nor in the judgment of Swinfen Eady J., was there any allusion to that covenant. In my opinion it is impossible to allow that declaration to stand, because it would follow that the lessee might assign the term to a limited

company notwithstanding that covenant. I much regret that this point was not taken in the Court below, and I wish I could see my way to order the appellant to pay the costs of the appeal, but I think that the only order we can make is to allow the appeal and dismiss the action without costs either here or in the Court below. In this view of the case it is not necessary to say one word on either of the points decided by Swinfen Eady J., as to each of which I desire to keep an entirely open mind.

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FLETCHER MOULTON and FARWELL L.JJ. concurred.

Solicitors: *Hier Jacob, for J. R. Jacob, Abergavenny; A. R. & H. Steele, for Gabb & Walford, Abergavenny.*

H. B. H.

CORSELLIS *v.* LONDON COUNTY COUNCIL.

C. A. 1907 *Oct.* 30, 31; *Nov.* 11.

[1906 C. 1747.]

London—Streets—Tramway—Footway—Dedication to Public—Road Authority—Powers—Widening of Roadway—Narrowing of Footway—Delegation of Statutory Powers—57 Geo. 3, c. xxix. (Michael Angelo Taylor's Act), s. 52.

In 1883 building land in the Metropolis was demised to C. for a term of eighty-two years, and L., under an agreement with C., built several shops on a part of the land which fronted a highway. The shops were not built to the edge of the demised land, but a strip of land three feet wide was left between the front wall of the shops and the public footway. Subsequently in 1883 L. applied to the local authority to pave the footway in front of his shops right up to the building line, and the local authority informed him that on the slip of land being given up to form part of the public footway the footway would be paved. L. made no reply, and the footway was paved up to the wall of the shops. In the meantime C., who had no knowledge of L.'s application to the local authority, had granted L. separate underleases of the shops for eighty years, and had also assigned to him for value the head lease with a proviso against merger. In 1898 C. repurchased the head lease for value from L.'s successors in title. In 1906 the London County Council under the powers of a special Act converted a horse tramway in the highway in question into an electric tramway, and in connection with this work they widened the road and reduced the width of the footway and took up the pavement (including the pavement of the three-foot strip of land) in front of the shops. This work was done under an agreement made in May, 1906, with the borough council, whereby the

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borough council, in consideration of the reconstruction of the tramway, consented to the narrowing of the footway and agreed to pay part of the cost of paving, which was to be done by the county council. C. and the assignees of some of the underleases then brought this action against the London County Council for an injunction and damages in respect of (1.) the taking up of the pavement of the strip of land; (2.) the reduction of the width of the footway. In answer to the first the defendants alleged that the strip of land had been dedicated to the public by L. in 1883 and was part of the public footway, and in answer to the second that the borough council had power to authorize the defendants to make the reduction in the width of the footway, and that the work was done by the defendants under the authority of the borough council given by the agreement of May, 1906:—

Held, first (affirming the decision of Neville J.), on the evidence, that, whatever claim the local authority might have had against L., the plaintiffs were purchasers for value without notice of any claim for dedication, and were entitled to relief in respect of trespass; secondly (reversing the decision of Neville J.), that s. 52 of Michael Angelo Taylor's Act empowered the borough council, as the road authority, to alter the division of the roadway into footway and carriageway, that they must be taken by their agreement to have authorized the defendants to execute these alterations on their behalf, and that this was not a delegation of their statutory powers; consequently that in respect of the narrowing of the footway the plaintiffs' claim failed.

APPEAL from a decision of Neville J. (1)

By a lease dated April 18, 1883, J. Watney, the freeholder, demised a piece of land fronting York Road, in the borough of Wandsworth, to the plaintiff Corsellis for a term of eighty-two years from March 25, 1883, and Corsellis covenanted to build thereon a number of houses and shops. On April 16, 1883, Corsellis entered into a building agreement with one Lewry, in pursuance of which Lewry erected fifteen houses with shops on part of the land fronting York Road. The shops were not built to the edge of the demised land, but a strip of land three feet in width was left between the front wall of the shops and the public footway, such strip of land forming the forecourts to the shops. On September 25, 1883, when the buildings were completed, Lewry applied to the Wandsworth Local Board, being the road authority of the district, to pave the footway in front of the shops close up to the building line. On October 3, 1883, the local board passed a resolution that upon the ground separating

(1) [1907] 1 Ch. 704.

the new shops in York Road from the public way being given up to form part of such public way the footway be paved at an estimated cost of 71*l.* 7*s.* On October 5 the clerk to the board accordingly wrote to Lewry: "I am instructed by this board to inform you that upon the ground separating the shops from the public way being given up to form part of such public way the footpath in question will be paved by them." So far as appeared by the evidence Lewry made no reply to this letter, but the local authority did in fact pave the footway right up to the front wall of the shops. There was no physical line of demarcation between the paved strip of land and the public footway, except that Lewry had constructed in the strip of land gratings flush with the pavement in front of the shops. In the meantime Corsellis had granted to Lewry separate underleases dated September 3, 1883, of the fifteen shops for a term of eighty years from March 25, 1883. On October 3, 1883, Lewry purchased for value the head lease from Corsellis subject to the fifteen underleases and with a declaration against merger, and on October 4 he mortgaged the head lease to one Nind, who in 1885 purchased from Lewry the equity of redemption therein. In 1898 Corsellis purchased the head lease for value from Nind's successors in title.

In the spring of 1906 the London County Council, being desirous of converting certain horse tramways belonging to them in York Road into electric tramways, arranged with the Wandsworth Borough Council that the road should be widened, and that certain portions of their existing system of tramways consisting of a single line tramway should be converted into double lines. Accordingly on May 31, 1906, an agreement was entered into between the county council and the borough council whereby it was agreed that the borough council should acquire the whole of the property required for the widening of York Road, and the county council agreed to reconstruct so much of the tramways in question as consisted of single lines as double lines, except in certain places where the tramway was to be reconstructed as an interlaced line, and in consideration thereof the borough council consented to the narrowing of the footpaths along certain portions of the thoroughfare (which

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included the part opposite the shops in question); and further, the county council agreed to carry out the necessary paving works, and the borough council agreed to pay a proportion of the cost thereof, and the county council agreed to pay a proportion of the cost of acquiring the property above mentioned. Having obtained this agreement, the London County Council proceeded to reconstruct the tramways in York Road in the manner mentioned in the agreement and to widen the road, and in connection with this work they took up the pavement in front of the fifteen shops, including the pavement of the three-foot strip of land, and reduced the footway by 3 ft. 6 in., whereby the footway was reduced to six feet if the measurement was taken from the kerb to the wall of the shops, but to three feet if the strip of three feet immediately in front of the shops was excluded.

Thereupon Corsellis and the assignees for value of five of the underleases brought this action against the London County Council, claiming a declaration that the strip of land in front of the shops was private property and had not been dedicated to the public, and an injunction to restrain the defendants from trespassing thereon and damages for injury done; and claiming also damages for reducing the width of the footway in front of the shops, whereby the plaintiffs were injured, and a mandatory injunction to restore the footway to its former width.

With regard to the claim for trespass, the plaintiffs alleged by their amended statement of claim that they were purchasers for value of their respective interests without notice of any claim by the defendants that the forecourts of the shops had been dedicated to the public. With regard to the reduction of the footpath, they alleged that the defendants, in reconstructing the tramways, were acting under the powers of the London County Council (Tramways and Improvements) Act, 1901 (1 Edw. 7, c. cclxxi.), which expressly provided that the footway should not be reduced to a less width than six feet; and alternatively that the defendants were acting under the powers of the London County Tramways (Electrical Power) Act, 1900 (63 & 64 Vict. c. ccxxxviii.), which gave no authority to them to reduce the width of the footway.

The defendants by their amended defence, in answer to the

first head of claim, alleged that the strip of land in question had been dedicated to the public by Lewry with the knowledge of the plaintiffs. In answer to the second head, they denied that they were acting under the powers of their special Act of 1901, and alleged that they were acting under the powers of their special Act of 1900; and, further, that the Wandsworth Borough Council, as the road authority, had power under s. 80 of Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.), as extended by s. 73 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), and the London Government Act, 1899 (62 & 63 Vict. c. 14), to authorize the defendants to make alterations in the roadway and footpath in front of the plaintiffs' shops, and that the alterations made by the defendants were made by them under the authority of the borough council given by the agreement of May 31, 1906.

The London County Council (Tramways and Improvements) Act, 1901, authorized the defendants to make certain new tramways and to alter and reconstruct certain existing tramways in the borough of Wandsworth (ss. 4 and 5), but these tramways did not include the tramway in that part of York Road which was opposite the plaintiffs' shops.

Sect. 12, by sub-s. 1, authorized the defendants, with the consent of the road authority, to make crossings and passing places in connection with tramways then or thereafter belonging to them in addition to those particularly specified in the Act; and, by sub-s. 2, authorized the defendants, with the consent of the road authority and with the sanction of the Board of Trade, to "lay down double lines in lieu of single or single lines in lieu of double lines or interlacing lines in lieu of double or single lines on any of their tramways," and, with the like consent and sanction, to "alter the position in the road of any such tramways or any part thereof respectively."

Sect. 13 provided: "For the purpose of constructing any of the new tramways or reconstructing any tramways under this Act the council may increase the width of the roadway of the street in which it is to be laid by reducing the width of the footway on each or either side of such street but only with the consent in each case of the authority having the maintenance and

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repair of the roadway: Provided that no footway be so reduced to a less width than six feet."

The London County Tramways (Electrical Power) Act, 1900, was passed to enable the defendants to work their tramways by electrical power, and it applied to all tramways in the administrative county of London which had been or should be acquired by them; and by s. 6 the defendants were authorized to reconstruct or make such alterations of the tramways, and to execute all such works on or in connection therewith in, over, or under the streets or roads in which the same were laid as might be necessary for adapting the same to be so worked.

Michael Angelo Taylor's Act, s. 52, provides that the commissioners or trustees, or other persons having the control of the pavements of the streets and public places in any parochial or other district within the jurisdiction of the Act, "shall and may from time to time cause the ground of any streets or public places within their respective parochial or other districts to be raised or lowered in such manner as they . . . . shall think necessary; . . . . and also . . . . shall or may from time to time direct and cause the course of any gutter or channel, running in or through any streets or public places within their respective parochial or other districts, to be turned or altered in such manner as they shall think proper. . . . ."

Sect. 80 enacts, "that for the improvement of the streets and public places in the parochial or other districts within the jurisdiction of this Act, and for the public advantage, it shall and may be lawful to and for the commissioners or trustees, or other persons having the control of the pavements of any parochial or other district, from time to time and at all times hereafter to alter, widen, turn, or extend any of the streets or other public places within any such parochial or other district (except turnpike roads), and to lengthen and continue or open the same from the sides or ends of any streets or public places within any parochial or other district, into any other street or public place within such or any other parochial or other district, and to raise, level, lower, drain, ballast, gravel or pave such new part or parts of any such streets or public places so altered, widened, extended, opened or lengthened as aforesaid; . . . . "

Neville J. decided both issues in favour of the plaintiffs. He held, first, that there had been no dedication of the strip of land to the public; and, secondly, that the defendants did the work of reconstructing the tramway under their special Act of 1901, and acted ultra vires of the powers of that Act; and he granted an injunction to restrain the trespass, and directed an inquiry as to the damages occasioned to the plaintiffs other than Corsellis by reason of the trespass and by reason of the reduction of the width of the footpath.

The defendants appealed.

Jenkins, K.C., and *Joseph Tanner*, for the defendants. [Upon the first question, which was not strenuously argued, the Court intimated that they agreed with the decision of Neville J.] With regard to the reduction of the footway, s. 13 of the special Act of 1901 has no application to this tramway. By s. 80 of Michael Angelo Taylor's Act power is given to the road authority, in this case the borough council of Wandsworth, to widen the road, which involves power to reduce the footway, and the borough council, when they authorized the county council to make the reduction on their behalf, were exercising their powers under that section.

[They were stopped.]

Peterson, K.C., and *C. E. Allan*, for the plaintiffs. The work of altering the tramway was done by the defendants under s. 12 of their special Act of 1901, which applies to any of their tramways, and that was a reconstruction within s. 13. The defendants had no other power to reduce the footway, for the special Act of 1900 confers no such power upon them. It is sought to justify the reduction by having recourse to Michael Angelo Taylor's Act, s. 80, but both the county council and the borough council were purporting to act under the Act of 1901, and nothing else. There was here no exercise by the borough council of their powers under s. 80; they merely consented to the reduction of the footway by the county council. Assuming that that section has any application, this would be an illegal delegation by the borough council of their statutory powers. Further, the section requires that there shall be a determination by the road authority

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that the exercise of the powers thereby conferred will be for the improvement of the street and for the public advantage; but there has been no such determination by the borough council as to the reduction of this footpath, for the section was never present to their minds. Lastly, the section does not authorize the reduction of the footway.

[FARWELL L.J. referred to s. 52.]

[They cited *Parry* v. *Metropolitan Borough of Hammersmith* (1); *Westminster Corporation* v. *London and North Western Ry. Co.* (2); *Lynch* v. *Commissioners of Sewers of the City of London.* (3)]

Jenkins, K.C., in reply.

[COZENS-HARDY M.R. We wish to hear you only upon the question whether there has been an exercise by the borough council of their powers under Michael Angelo Taylor's Act.]

No doubt the work was actually done by the London County Council, but it does not matter who physically does the work, and it is material to observe that under the agreement of May 31 the cost of the work was to be apportioned between the county council and the borough council. Of course, the borough council must not delegate their power of deciding whether the street shall be altered; but, having decided that, it is immaterial whether they do the work themselves or authorize somebody else to do it. They cannot delegate their discretion, but the ministerial act may be done by anybody.

The Court (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.) reserved their judgment.

Nov. 11. COZENS-HARDY M.R. delivered the judgment of the Court, which had been prepared by Fletcher Moulton L.J., as follows:—

The claims of the plaintiffs in this action are twofold, the one relating to the interference by the defendants with a strip of land three feet in breadth adjoining the fronts of the houses or shops belonging to the plaintiffs in the action (other than Mr.

(1) (1904) 69 J. P. 35. (2) [1905] A. C. 426.
(3) (1886) 32 Ch. D. 72.

Corsellis) and the other relating to the interference by the defendants with the footway in front of those houses by reducing it in breadth.

With regard to the first of these causes of action we see no reason to differ from the conclusion arrived at by the learned judge in the Court below. The defendants base their defence on an alleged dedication by a Mr. Lewry in October, 1883, of the strip of land in question to the public as a highway; but the learned judge has found, and we think rightly, that there is no evidence upon which dedication by Mr. Lewry could be found, even had he been the owner in fee of the strip, which was not the case. [His Lordship stated the facts as to this part of the case, and continued:—]

It may be that as against Mr. Lewry the authority might have been in a position to insist that the strip should be given up to the use of the public during his term either on the ground of estoppel or of actual contract. But we are of opinion that even if this were so it could not avail against the plaintiffs, who are bona fide purchasers of the legal interests which belong to them without notice of the claim of the local authority, and it seems to us, therefore, that it is unnecessary to inquire whether in fact the local authority had any and what rights against Mr. Lewry, or how and at what date those rights accrued. The judgment appealed against must, therefore, be affirmed as to this portion of the case.

The second portion of the plaintiffs' claim is of a wholly different character. The plaintiffs (other than Mr. Corsellis) in their original statement of claim alleged that the tramway in front of the shops had been reconstructed by the defendants under the powers of s. 13 of the London County Council (Tramways and Improvements) Act, 1901, and that under the provisions of that section it was unlawful to reduce the footway to a less width than six feet. In their amended statement of claim they inserted an alternative claim to the effect that the works were done by the defendants under the powers of the London County Tramways (Electrical Power) Act, 1900, and that under such Act they were not entitled to reduce the width of the footway. It is admitted that the footway has been

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reduced in width, and that if the strip immediately in front of the houses does not belong to the footway (which we hold to be the case), the footway has been reduced to a less width than six feet.

The defendants in their amended defence put in issue the allegation that the tramway, or any part thereof, opposite the houses in question was reconstructed under the authority of the Act of 1901. They alleged that the works upon the tramway in front of the plaintiffs' houses were done under the authority of the London County Tramways (Electrical Power) Act, 1900, and that the alteration in the footway was done by them by the authority of the Wandsworth Borough Council given by an agreement dated May 31, 1906, and that such borough council, as the authority having control of the roadway and pavements, had power to authorize them to make such alteration.

The case of the plaintiffs, as argued before us, was substantially based upon the contention that the alteration to the tramway in front of the houses in question was done under the powers given to the defendants by s. 13 of the Act of 1901. [His Lordship read the section.] It will be observed that this is an enabling section, and that by it powers are granted to the London County Council to increase in certain cases the width of the roadway of a street by reducing the width of the footway, but such powers are subject to the proviso that no footway is to be so reduced to a less width than six feet. We are of opinion that this proviso relates solely to acts done under the enabling part of the section, and that it has no reference whatever to acts done by virtue of powers otherwise conferred upon or possessed by the London County Council. It would be a most dangerous principle of construction to interpret a clause of this character, purporting to give new powers which are only to be exercised subject to a condition, as interfering with or restricting powers already existing. The main question, therefore, becomes the following: Were the alterations in the tramway in front of the houses done under the powers conferred by s. 13 of the Act of 1901, or under powers previously existing?

We are of opinion, in the first place, that s. 13 does not refer to or include the works in question. If the Act be

examined it will be found that (so far as tramways are concerned) it relates to two classes of specific works described respectively in ss. 4 and 5 of the Act, and referred to in the Act as "the new tramways" and "the reconstructed tramways." It is common ground that the works in front of the houses in question are not enumerated or referred to in either of these sections; but the plaintiffs contend that s. 12 of the Act of 1901 gives by sub-s. 2 a general power for the future to reconstruct any tramways, and that, therefore, all tramways reconstructed after that date are to be deemed tramways reconstructed under that Act. It seems to be a most extraordinary construction to put upon s. 12 of the Act of 1901 to hold that it gives generally the power to reconstruct any and every tramway at any time in the future, or, in other words, that it does for all tramways by a general clause exactly what it effects for certain specified portions of existing tramways enumerated in s. 5 by the elaborate provisions which appear in the Act relating thereto. And in this connection it is not unworthy of remark that the term "reconstruct" is nowhere used in s. 12. Be that as it may, we are of opinion that the language of s. 13 shews that it was intended to relate only to tramways the authority to reconstruct which was specifically given by the Act, namely, those set out in s. 5, and that it does not relate to all tramways which may have had their position in the road altered, or crossing or passing places, or other works added to them under the general powers given under s. 12.

We are further of opinion that the London County Council possessed the authority to make the alterations in the tramways in front of the houses prior to and independently of the Act of 1901. These alterations seem to have consisted in shifting one of the pairs of lines for a distance of about one foot. This alteration was made for the purpose of the conversion of that system of horse tramways in York Road, Wandsworth, into electric tramways. The Act of 1900 was specifically for the purpose of enabling the London County Council to make all alterations in the tramways they then possessed, or were then about to acquire, necessary to enable them to be worked by electric traction; and it is not contested that the provisions

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of the Act apply to the tramways in question. Sect. 6 provides that, subject to the provisions of that Act, the London County Council, for the purpose of working the tramways by electric power, "may reconstruct or make such alterations of the tramways and may execute all such works on or in connection therewith in, over, or under the streets or roads in which the same are laid as may be necessary for adapting the same to be so worked." We have, therefore, come unhesitatingly to the conclusion that no powers of the Act of 1901 were required to enable the London County Council to make the alterations in the tramways in front of the houses. They already possessed adequate powers under s. 6 of the Act of 1900.

To this the plaintiffs reply that the language of the Act of 1900 would not entitle the defendants to alter the footway. It is not, in our opinion, necessary to decide this point (although the language of s. 10 of the Act is strongly in favour of the opposite conclusion), because under s. 52 of 57 Geo. 3, c. xxix. (Michael Angelo Taylor's Act), the Wandsworth Borough Council had full power to alter the footpath in the manner in question. That this Act applies to the locus in quo is not disputed; and by the section in question the "persons having the control of the pavements" have the property in the pavements vested in them; and among other very wide powers they have given to them the power to "cause the ground of any streets or public places within their . . . . districts to be raised or lowered" in such manner as they shall think necessary, and to direct the course of any gutter or channel running through any such streets or public places to be turned or altered in such manner as they shall think proper. These specific powers clearly cover a change in the division of the roadway into footway and carriageway, even if the power to make such change would not be deemed to be implied in the position which the local authority undoubtedly occupy as being the persons having the charge and management of the roads. It is true that the Wandsworth Borough Council did not do the work by workmen directly employed or paid by them; but the London County Council, in doing the actual work upon the footway, were acting under an agreement with the Wandsworth Borough Council

dated May 31, 1906. This agreement related to extensive works to be done along the line of the York Road, and made provision for acquiring land for widening and also for executing the actual works for widening and altering the roadway and footpath and repaving. These works were done by the London County Council on behalf of both bodies, the Wandsworth Borough Council contributing an agreed sum or proportion towards the cost. In entering into such an agreement, and permitting and requiring its performance by the London County Council, we are of opinion that the borough council must be taken to have given to the London County Council authority to perform the works on their behalf as far as the borough council possessed such authority. Now it is not contested that they possessed sufficient authority to perform the works themselves. They could, therefore, execute them by the hands of the London County Council. It was suggested on behalf of the plaintiffs that this would be a delegation of their statutory powers, and that the law does not permit such delegation; but we are of opinion that this argument cannot be supported. It is not delegation on the part of a local authority to arrange that some other person shall perform the ministerial acts necessary to carry out such works as in the exercise of their powers they have determined shall be done, otherwise it would be impossible for such an authority to employ a contractor. We are therefore of opinion that the plaintiffs have failed to establish that the reduction of the width of the footway was an unlawful act on the part of the London County Council, and that on this part of their claim the appeal must be allowed.

Solicitors: *Seager Berry; Corsellis & Berney.*

H. B. H.

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In re BAYLEY-WORTHINGTON AND COHEN'S CONTRACT.

[1907 B. 1481.]

Settlement—Estate Tail—Disentailing Assurance—Protector—Three Persons appointed by Settlor—Death of Two—Power to appoint New Protector—Power not exercised—Consent of surviving Protector—Fines and Recoveries Act, 1833 (3 & 4 *Will.* 4, *c.* 74), *ss.* 22, 32.

Where two or more protectors of a settlement are appointed by the settlor under the Fines and Recoveries Act, 1833, with no provision for appointing successors and no reference to survivorship, prima facie the office of protector survives; and a power in the settlement to appoint protectors to fill up vacancies "to the intent that the protectorship may be kept up to the original number" is not sufficient to negative the presumption of survivorship in the event of the power not being exercised.

Bell v. *Holtby*, (1873) L. R. 15 Eq. 178, approved.

This was an appeal from a decision of Neville J.

Thomas Worthington, by his will dated October 24, 1851, after appointing George Williamson, Thomas E. Mulliner, and William Bayley to be his executors and trustees, directed his trustees to stand possessed of his real and personal estate in trust in the events which happened for Gibbon Bayley for his life, and after his decease as to his real estate in trust for the first and other sons of the said Gibbon Bayley successively in tail, with divers remainders over. The will proceeded as follows: "And I hereby nominate and appoint (as my anxious desire is to prevent the entails created by this my will from being barred or destroyed so long as the rules of law will permit) my said trustees and executors to be protectors of the several estates tail created by this my will during the continuance of the estate or respective estates for life for the time being prior or antecedent to such estate tail or estates tail respectively with such discretionary powers authorities and privileges as the Act of Parliament in that behalf hath annexed to the office of protector thereby created and I direct and declare that the person or persons who would if no protector were appointed by this my

will be the protector or protectors of the said entail or entails shall be absolutely and wholly excluded from the protectorship notwithstanding that by death or the happening of any other event or contingency occasioning a vacancy in the said office the protectorship hereby constituted shall be temporarily suspended. Provided always and I further declare that in case any of them the said protectors or any protector or protectors to be appointed as hereinafter mentioned should die or be desirous to relinquish the office of protector then and in every such case it shall be lawful for the surviving or continuing protector for the time being or if there should be no surviving or continuing protector then for the executors or administrators of the last deceased protector or if there should be no such person then for the protector or protectors so relinquishing the office as aforesaid by any deed or deeds to be duly enrolled in the High Court of Chancery to nominate and appoint one or more person or persons not being tenant for life for the time being of the hereditaments hereinbefore devised and appointed to be a protector or protectors in the room of the person or persons who shall so have died or have relinquished the protectorship as aforesaid to the intent that the full number of three persons shall and may from time to time fill the said office and the person or persons so to be nominated and appointed as aforesaid shall have and may exercise either in conjunction with the surviving or continuing protector or protectors or solely as the case may be the same discretionary powers authorities and privileges in all respects as he or they would have had and might have exercised if he or they had been appointed a protector or protectors of the said estate tail or respective estates tail by this my will. And it is my especial request and entreaty that the protectors for the time being will exercise the controlling power vested in them by the aforesaid Act of Parliament in declining and refusing during the whole continuance of the protectorship hereby created to aid any tenant in tail under this my will in acquiring the fee simple in the hereditaments hereby devised in trust for him or her unless for the purpose of resettling and assuring the said hereditaments in such manner as will tend to fix and perpetuate the same in my descendants."

Of the three protectors appointed by the testator two, viz.,

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G. Williamson and T. E. Mulliner, were dead, and the power of appointing new protectors had not been exercised. Gibbon Bayley, now known as Gibbon Bayley-Worthington, was tenant for life under the settlement, his eldest son T. G. Bayley-Worthington, who had attained twenty-one in 1890, being tenant in tail in remainder expectant upon the determination of his father's life estate.

By a disentailing assurance dated January 29, 1891, T. G. Bayley-Worthington, with the consent of William Bayley as protector, purported to bar the entail.

By a contract dated June 18, 1907, a portion of the settled estate was agreed to be sold. Upon investigation of the title the purchaser objected that, having regard to the provisions of the will, William Bayley, being the survivor of the three protectors appointed by the testator, was not at the date of the disentailing assurance of January 29, 1891, protector of the settlement within the meaning of the Fines and Recoveries Act, 1833, and a summons was taken out by the purchaser under the Vendor and Purchaser Act, 1874, for a declaration that a good title had not been shewn in accordance with the particulars and conditions of sale.

Upon the hearing of the summons Neville J. said that *Bell* v. *Holtby* (1) only decided that, in the absence of any expressed intention to the contrary, the mere appointment of one or more persons to be protector made the office an office which survived. He held, however, upon the construction of the will, that the settlor had expressed the intention that the office of protector should be exercised by three persons and three persons only. He thought that was to be gathered from the words "to the intent that the full number of three persons shall and may from time to time fill the office." He came to the conclusion, therefore, that the consent of the protector had not been obtained to the disentailing deed, and consequently that a good title had not been shewn.

From this decision the vendors appealed.

Upjohn, K.C., *Peterson*, K.C., and *Underhill*, for the appellants. Upon the construction of the will it is clear that the testator

(1) L. R. 15 Eq. 178.

refers to the protectorship as an office. It cannot be said that the protectorship was suspended. There is no negative provision that in case of the death of one or more protectors the survivors or survivor shall not act. When three trustees are appointed with a direction that every vacancy shall be filled up immediately, that does not prevent the survivors from acting in the absence of any express provision by the testator to that effect. There must be some negative provision to take away the power of the survivors to act. There is nothing here beyond direction or expression of desire that the office of protector shall be kept full. The principle is stated in *Warburton* v. *Sandys* (1) and *Doe* v. *Godwin*. (2) Apart from construction, however, this case is covered by *Bell* v. *Holtby* (3), where, in a simple case of two protectors appointed with no provision for appointing successors, and no reference to survivorship, it was held that on the death of one of them the survivor possessed, under the Fines and Recoveries Act, all the powers of a protector.

Jenkins, *K.C.*, and *T. K. Nuttall*, for the respondent. No doubt it was held in *Bell* v. *Holtby* (3) that the office survived, but if necessary we submit that that decision was wrong. A bare power given to two or more cannot be exercised by the survivor: Farwell on Powers, 2nd ed. p. 454. The effect of the proviso at the end of s. 32 of the Act is that the survivor of three protectors cannot exercise the office unless he happens to be the person who, but for the section, would have been the protector. The intention of the Act was that the office should not survive except in the one case expressly provided for: *Clarke* v. *Chamberlin*. (4) Apart from the Act the settlor can provide that the office shall survive. The question is whether he has done so in this case or not. On construction of the will it is submitted that the testator did not intend the power to be exercised by a surviving protector: *In re Wainewright*. (5)

Cur. adv. vult.

(1) (1845) 14 Sim. 622.
(2) (1822) 1 D. & R. 259.
(3) L. R. 15 Eq. 178.
(4) (1880) 16 Ch. D. 176.
(5) (1843) 1 Ph. 258.

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Oct. 22. COZENS-HARDY M.R. The question in this appeal is whether a disentailing assurance executed by a tenant in tail in remainder, with the consent of the survivor of three protectors appointed by the will of the settlor, is valid. This depends primarily upon the construction of the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), and, secondly, upon the language of the will creating the settlement. Now, on the first point, it was decided in *Bell* v. *Holtby* (1) by Malins V.-C. in the year 1873 that, in a simple case where two persons were appointed protectors with no provision for appointing successors, and with no reference to survivorship, a survivor possessed under the Act all the powers of a protector. This decision, so far as I am aware, has never been questioned, and many titles must depend upon it. It would, in my opinion, be wrong for this Court to overrule such a decision unless we are clearly satisfied that it cannot be supported, but after careful consideration of the statute I feel no doubt that the view taken by Malins V.-C. was correct and ought to be followed. Sect. 22 authorizes the creation by a settlor of an entirely new office, namely, that of "protector." Not more than three persons may be appointed protector, a word which is used sometimes as a name for the office and sometimes as descriptive of the individuals who together protect the settlement. The office is one to which no estate is attached. The analogy of powers given to executors or to guardians virtute officii which can be exercised by a survivor seems to apply. Moreover, the language of s. 32 lends no colour to the argument that the Court of Chancery must be applied to whenever one of the protectors dies, and the tenant for life is expressly excluded from the office. The words in the middle of s. 32 dealing with the power to appoint a new protector in case of the death or relinquishment of one of several protectors treat the survivor as still holding the office of protector; and the proviso at the end of the section, which in my opinion applies whether the tenant for life is or is not included in the persons appointed protectors, goes far to shew that the office of protector is not suspended

(1) L. R. 15 Eq. 178.

or in abeyance so long as any one of the named protectors survives.

Unless, therefore, there is something in the will of the settlor to alter the position, I think the concurrence of the survivor of the three protectors enabled the tenant in tail to bar the entail. I do not, however, doubt that a settlor may appoint three persons as protectors only during the joint lives of the tenant for life and the three persons, and if such is the meaning and effect of the will in the present case the purchaser's objection is well founded. But upon careful consideration I cannot adopt this view. I find in the first clause a clear appointment of three persons to be protectors, with such discretionary powers, authorities and privileges as the Act of Parliament in that behalf annexed to the office of protector, and I find an express exclusion of the tenant for life. Then follow certain provisions for the appointment of a new protector or protectors in the event of death or relinquishment, "to the intent that the full number of three persons shall and may from time to time fill the same office." The utmost effect that can be given to this clause is that if and when the power is exercised the full number of three protectors must be made good. I am not prepared to hold that it has even that effect. I cannot find anything in the will amounting to a direction, express or implied, that the office of protector shall be suspended until the full number of three has been made up. I think the powers attached by statute to the office of protector passed to and remain in the survivor, notwithstanding that the survivor has not exercised the power which the settlor undoubtedly desired him to exercise. The principle laid down by Shadwell V.-C. in *Warburton* v. *Sandys* (1) seems to me to be directly applicable to the present will. With great respect to Neville J., I think the appeal must be allowed, and a declaration be made that the purchaser's objection on this point is not well founded.

FLETCHER MOULTON L.J. I am of the same opinion. We have in the will in this case a clause of appointment of protectors which is expressed in full and precise language, and in my opinion

(1) 14 Sim. 622.

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indicates the intention of giving to these protectors the full legal status and powers of what I may call a normal or unqualified appointment under s. 32 of the Act. There is no indication of any limitation or qualification of the powers and incidents that would naturally follow an appointment under that section. Then we have a clause creating a power of filling up the vacancies on the death or relinquishment by protectors appointed under the earlier clause. Now, although that expresses clearly the desire of the testator that the full number of three protectors should be always kept up, I can find no words in it which would justify our considering it as qualifying or imposing a limitation upon the effect of the clear and precise language of the appointing section. That being so, and the donee of the power not having exercised it, we are, in my opinion, thrown back upon the appointing section, and the appointing section only; in other words, the question in this case is no other than the precise question that was decided in *Bell* v. *Holtby*. (1)

For the reasons given by the Master of the Rolls I am of opinion that that was a correct decision, and that, therefore, this appeal must be allowed.

FARWELL L.J. Sect. 32 of the Fines and Recoveries Act empowers any settlor entailing land to appoint any number of persons in esse, not exceeding three, to be "protector" of the settlement "in lieu of the person who would otherwise have been protector under the Act." Malins V.-C. held in *Bell* v. *Holtby* (1) that this section enabled the creation of an office which (in the absence of any expression of a contrary intention) continued to exist so long as any of the persons nominated remained alive and had not resigned, and he likened the appointment to that of guardians.

This decision has stood unreversed and unimpeached for thirty-four years, and many titles must have been accepted on the strength of it. I should be very slow to interfere with such a decision, even if I differed from it, for the reason given by Lord Mansfield in *Hodgson* v. *Ambrose* (2), but I agree with the Vice-Chancellor's decision. Sect. 32 speaks of the appointment of the

(1) L. R. 15 Eq. 178. (2) (1780) Doug. 337, 341.

three persons as "protector of the settlement," and treats the protectorship as an office which may be continued from time to time by the appointment of other persons—unlike the case of bare powers given to persons named, and to no one else; nor can I see any ground for supposing that any particular importance is attached by the Act to any particular nominee or number of nominees. I think, also, that the proviso at the end of the section is in favour of this view. It enables the appointors to appoint the tenant for life or other person entitled under s. 22 as one of the nominees under the earlier part of the section, and then provides that such tenant for life or other persons shall, unless otherwise directed by the settlor, act as sole protector if the other persons constituting the protector have died or ceased to act. The respondent asks us to insert the words "if so appointed" before "unless otherwise directed"; but this appears to me impossible, and it might lead to this extraordinary result—the expression that he may act after the death or retirement of all the others might exclude him from acting with the survivor or other if one only had died or retired; and a greater power and duty would thus be given to him alone than is entrusted to him in conjunction with another. The object of the proviso, in my opinion, is to make it clear that the position of a tenant for life or other person entitled under s. 22 remains unaffected by the appointment of a protector under this section after such appointment has come to an end, although the tenant for life or such other person may be himself appointed under s. 32. It is, however, open to the settlor to alter or modify the tenure of the office created by the Act, and Neville J. has held that he has done so. I am unable to agree with this reading of his will. In my opinion the testator shews clearly that he is dealing with an office; he speaks of the "office of protector"; he does not state that if any one of his nominees die the office shall be vacant, but merely provides that, if the office should be vacant by death or otherwise, the tenant for life or other person under s. 22 shall not come in, leaving it to the Act to determine whether the office has become vacant or not and to fill up the gap until the office, if vacant, has been filled up by fresh appointment. Neville J. has relied on the words in the power of appointment—"to the intent that the

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full number of three persons shall and may from time to time fill the said office"; but there are no words negativing the exercise of the duties of the office by the holder or holders thereof from time to time unless there be the full number of three—the provision is merely directory that the office be filled, not restrictive, that the powers of the office shall not be exercised unless and until it is filled. I am therefore of opinion that a good title has been made, and that this appeal should be allowed.

Solicitors: *Woodcock Ryland & Co.; North, Kirk & Co., Liverpool.*

G. A. S.

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Nov. 1.

In re HAZELDINE'S TRUSTS.

[1906 H. 1282.]

Limitations, Statute of—Mortgage—Real Estate subject to Trust for Conversion—Rents and Profits of unconverted Real Estate—Payment into Court by Trustees under Trustee Act, 1893*—Payment out—Mortgagee's Claim for Principal and Interest—Res judicata—Real Property Limitation Act,* 1833 (3 *& 4 Will.* 4, *c.* 27), *s.* 34*—Real Property Limitation Act,* 1874 (37 *& 38 Vict. c.* 57), *s.* 8.

A testator, who died in 1878, by his will gave the residue of his real and personal estate to trustees upon trust to convert at their discretion, and to divide the proceeds among his four children in equal shares. Part of the testator's residuary real estate consisted of an estate pur autre vie in a freehold house, which the trustees, in the exercise of their discretion, retained. In 1889 two of the children mortgaged their interests in this property and the proceeds thereof. More than twelve years later, viz., in 1905, the trustees paid into Court under the Trustee Act, 1893, certain sums representing the shares of the mortgagors in the rents and profits of this property. Up to this time no steps had been taken to enforce the mortgage, nor had any part of the principal or interest ever been paid, nor had any acknowledgment been given. Subsequently in 1905 the mortgagees applied for payment out of the fund in Court to them and other incumbrancers of the mortgagors in order of priority; but this summons was dismissed, and no appeal was brought from that dismissal. The mortgagors then applied for payment out of the fund to them:—

Held, that the mortgagors were entitled to have the fund paid out to them without satisfying the mortgage debt, inasmuch as (1.) the mortgagees were precluded by the dismissal of their summons from asserting

any claim against the fund; (2.) the effect of s. 34 of the Real Property Limitation Act, 1833, was to extinguish their title to the mortgage.

In re Lloyd, [1903] 1 Ch. 385, explained and distinguished.

Decision of Warrington J. reversed.

APPEAL from a decision of Warrington J. (1)

George John Hazeldine, by his will dated July 24, 1874, devised and bequeathed the residue of his real and personal estate to trustees upon trust to convert at their discretion, and to assign and transfer or pay or divide his net residuary trust estate between his four children Harriot Laura Hazeldine, Ethel Violette Hazeldine, Norton Fairfax Whitbourn Hazeldine, and Stanley Wellborne Hazeldine in equal shares, the shares of such children to be vested in them respectively on their respectively attaining the age of twenty-one years.

The testator died on March 15, 1878.

At the date of his death the testator was possessed of (inter alia) an estate for the life of his brother Francis Hazeldine, who was still living, in certain freehold premises known as Oaklands, situate at Godstone, in the county of Surrey. This property had not been sold, but had been retained by the trustees in the exercise of the discretion given them by the will, and had been treated by them as forming part of the testator's residuary trust estate.

N. F. W. Hazeldine attained the age of twenty-one in November, 1886, and S. W. Hazeldine attained that age in March, 1888.

By an indenture of mortgage dated October 16, 1889, N. F. W. Hazeldine and S. W. Hazeldine conveyed and assigned (as beneficial owners) to J. Edwards and H. Isaacs, carrying on business under the style of the Union Deposit Bank, (inter alia) all their interests in the Oaklands property and in "the proceeds thereof" to secure the repayment of 200*l.*, with interest thereon at a very high rate. The mortgage contained the usual covenant for payment of principal and interest. The benefit of this mortgage was subsequently transferred to the Union Deposit Bank, Limited.

N. F. W. Hazeldine and S. W. Hazeldine executed numerous

(1) [1907] 1 Ch. 686.

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other mortgages of their shares in the testator's residuary trust estate, notices of which were received by the trustees.

In July, 1896, in consequence of the numerous and conflicting claims of the various mortgagees, the trustees paid into Court under the Trustee Act, 1893, a sum of 111*l.* 0*s.* 8*d.*, representing the shares of N. F. W. and S. W. Hazeldine in the net rents and profits of Oaklands to the credit of an account entitled "In the matter of the trusts affecting the shares of Norton Fairfax Whitbourn Hazeldine and Stanley Wellborne Hazeldine in the outstanding residuary estate of George John Hazeldine deceased." And in January, 1905, they paid into Court to the credit of the same account a further sum of 254*l.* 3*s.* 1*d.* in respect of the rents and profits of the same property.

Up to this time neither the Union Deposit Bank nor their predecessors in title had ever taken any steps to enforce the mortgage, nor had any part of the principal money thereby secured or any interest thereon ever been paid, nor had any acknowledgment of any right thereto been given.

Subsequently in 1905 the bank took out a summons before Warrington J., asking for an inquiry as to the priorities of the various mortgagees of N. F. W. and S. W. Hazeldine on the fund in Court, and for payment out to the persons entitled in order of priority. This summons was dismissed in chambers, and no appeal was brought against that dismissal.

In 1906 N. F. W. and S. W. Hazeldine took out a summons asking that the fund in Court might be paid out to them in moieties. All the incumbrancers were made respondents to this summons, but only the Union Deposit Bank appeared on the hearing.

Warrington J. held that the case fell within the principle of *In re Lloyd* (1), and that the applicants were not entitled to payment out except upon the terms of paying to the bank the principal sum due on their mortgage, with interest thereon at 5 per cent.

The applicants appealed.

Romer, K.C., and *C. L. Hales*, for the applicants. In 1905 the respondents took out a summons asking for payment out

(1) [1903] 1 Ch. 385.

of the fund to the mortgagees of the applicants in order of priority. That summons was dismissed, and no appeal was brought against that dismissal. They are therefore precluded from making any claim against this fund.

But, further, nothing was done under this mortgage for upwards of twelve years from the date of its execution, and the result of that was that not only is the mortgagees' remedy against the land barred, but their title to the land itself is extinguished: Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8; Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 34.

"Land," as defined by s. 1 of the Act of 1833, includes "any share estate or interest" in land, and it cannot be disputed that this was a mortgage of an interest in land, which includes the proceeds of sale of land devised upon trust for sale. *In re Lloyd* (1), upon which the learned judge proceeded, was a decision upon s. 42 of the Act of 1833, which relates to arrears of interest, and has no application to the present case, because there the mortgage was not extinguished; here it is.

Edward Beaumont, for the respondents, the Union Deposit Bank. The subject-matter of this mortgage is not land, but money payable out of land; s. 34 of the Act of 1833 has therefore no application.

[Farwell L.J. That has already been decided against you on your summons.]

That only went to the right of the mortgagees to recover, but the debt still remains. This is a question of obtaining money from trustees, and although the mortgagees cannot sue for the money, yet, if their right still exists and only the remedy is barred, this Court, applying the principle that he who seeks equity must do equity, will not sanction the payment out of the fund to the mortgagors except upon the terms of their paying to the mortgagees the amount due for principal and interest under their mortgage. *In re Lloyd* (1) applies by analogy.

Cozens-Hardy M.R. In this case, with the greatest respect to Warrington J., I am unable to agree with the conclusion at

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which he has arrived. A mortgage was executed so long ago as 1889 by two of the four children who were entitled under the trusts of their father's will. The father's estate consisted, amongst other things, of an estate pur autre vie in freehold property. That estate had not been converted, and, so far as appears, it is not now converted. Nothing was done by the mortgagees for upwards of twelve years from the date of the mortgage; but the trustees received the rents and profits of the estate, and paid the other members of the family who were entitled to their shares free from incumbrances, and at a date more than twelve years after the date of the mortgage they paid into Court the shares of the two sons to this account—"In the matter of the trusts affecting the shares of Norton Fairfax Whitbourn Hazeldine and Stanley Wellborne Hazeldine in the residuary estate of George John Hazeldine deceased."

They did that because they had received notices of claim from various incumbrancers, and they did not know who was entitled to the fund. Then the mortgagees under the mortgage of 1889 applied for payment out of the fund to them. They said, "We are mortgagees. The principal and interest are still due under our mortgage. Pay the fund to us." That summons was dismissed with costs, and against that there was no appeal. It proceeded on the footing that under s. 34 of the Real Property Limitation Act of 1833, as amended by the Act of 1874, the title of the mortgagees against the mortgaged property, of which this fund in Court was part, was extinguished at the end of twelve years. That was decided, and that is not now open to appeal, and in saying that I do not wish to suggest that I have any doubt as to the propriety of that decision. That being now res judicata, the mortgagors then say, "You, the mortgagees, have no more right or title to this property than any individual in the Court; therefore this money must be paid to us." I confess I rather wonder that the mortgagees were ever served with the summons, but they were. Warrington J. seems to have thought that this case was governed by the principle of *In re Lloyd* (1), and that, although it might be that no action on the covenant could be maintained, yet when the mortgagors asked for payment

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out the mortgagees were entitled to say, "You cannot apply to a Court of Equity for payment out of this fund unless you do equity." There was, however, this difference at the outset between the two cases which does not appear to have been present to the mind of Warrington J., viz., that in *In re Lloyd* (1) the title of the mortgagees was not extinguished whereas in this case it was. The suggestion that a mortgagee whose title to the mortgaged property is extinguished can have any right to say as against the mortgagor, "Give me part of this property, to which I have no title except under the extinguished mortgage," is really a proposition which I think does not require many words to refute. The only equity to which, in any point of view, the mortgagor can be required to give effect is an equity arising out of the mortgage and affecting the mortgaged property by reason and by virtue of the mortgage, and, once you get at the fact that the mortgage is extinguished, in my opinion the mortgagee has no greater right or title to this fund than any person in the Court. I think the learned judge has not quite appreciated the point decided in *In re Lloyd* (1), and that this appeal must be allowed.

Fletcher Moulton L.J. I have come to the same conclusion, principally on the ground that the mortgagees' summons was dismissed and that no appeal was brought from that dismissal. I do not suggest that the summons was not rightly dismissed, but whether it was so or not the matters there decided are res judicata between the parties, and it seems to me that all the points which have been raised before us on behalf of the respondents must have been settled by that summons. I may add that in my opinion the case of *In re Lloyd* (1) does not apply to the present case for the reason given by the Master of the Rolls, viz., that the mortgage was not extinguished in that case, and that it was extinguished in this case.

Farwell L.J. I am of the same opinion. The fund in Court represents the rents of an undivided share in real estate mortgaged so long ago that time has run against the mortgagees.

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The effect of that was clearly to destroy the mortgagees' title. That has in fact been held in this very case when the mortgagees' summons to have the money paid out to them was dismissed. Whether that was the ground of the decision or not, I am clearly of opinion that the effect of the Act of 1833 was to extinguish the title of the mortgagee in a case like the present. That being so, there is nothing which the mortgagees can claim, because they have now become creditors without any remedy on the covenant to pay, and without any charge inasmuch as their title is extinguished. The learned judge has relied upon *In re Lloyd.* (1) With the greatest respect to him, I think he has been misled by assuming that the principle of that case has any application to a case like the present.

In *In re Lloyd* (1) there was a subsisting mortgage, and the only question was how much interest on that mortgage should be charged against the mortgagor as a term of allowing him to redeem; but here there is no mortgage or charge in existence. Where there is a mortgage or charge which the mortgagor desires to redeem, the Court gives him its assistance by interfering with the legal right of the creditor only on such terms as are equitable; such terms are the price of its interference. But this principle has no application to the case of a cestui que trust seeking execution of the trusts against his trustees or asking for payment out of Court of the trust fund belonging to him; he asks for no interference on his behalf with any other person's rights, but merely claims the enforcement of his own. Trustees holding property on trust for a class of individuals are not like executors in whom their testator's estate is vested for the purpose and with the paramount duty of paying his debts. The trustees have nothing to do with the debts of their cestui que trust, not being charges on his interest in the trust estate, and cannot set up against their cestui que trust any jus tertii, and least of all when such jus requires the waiver of the Statute of Limitations. And if the trustees cannot do it, neither can the Court, for, as Lord Chancellor Law says in *Fitzpatrick* v. *Waring* (2): "In the exercise of its jurisdiction for the administration of trusts this Court, I apprehend, has no power to make

(1) [1903] 1 Ch. 385. (2) (1882) 11 L. R. Ir. 35, 44.

or authorize any leases or other dispositions of the trust property which the trustee could not have made himself. The Court, in such a case, whether it assumes the place of the trustee, or guides him in the discharge of his duties, is still confined within the limits of the trust as constituted by its author, and has no authority to go beyond those limits. Its business is to *execute* the trusts, not to *alter* them." The Courts, in the administration of the usual trusts for beneficiaries, have neither duty nor power to compel such beneficiaries to pay their unsecured debts, even if not statute barred, and still less to order such beneficiaries not to plead the statute; nor have any of their unsecured creditors any locus standi which would justify their appearance in such suits.

The appeal must be allowed.

Solicitors: *W. H. Hales; Hicks, Arnold & Mozley.*

H. B. H.

DIBDEN *v.* SKIRROW.

[1905 D. 529.]

Franchise—Ancient Ferry—Bridge—Traffic diverted—Disturbance of Ferry.

The franchise of a ferry is not a grant of an exclusive right to carry across a stream by any means whatever, but only a grant of the exclusive right to carry across by means of a ferry.

Where, therefore, a bridge was constructed by private enterprise connecting the same highways as the ferry, whereby the ferry-owner lost all the income he used to receive from tolls:—

Held, that the bridge was not a disturbance of the ferry, and that the ferry owner had no remedy.

The dictum of Blackburn J. on this point in *Reg.* v. *Cambrian Ry. Co.*, (1871) L. R. 6 Q. B. 422, 430, can no longer be supported.

Hopkins v. *Great Northern Ry. Co.*, (1877) 2 Q. B. D. 224, discussed and followed.

Decision of Neville J., [1907] 1 Ch. 437, affirmed.

This was an appeal from a decision of Neville J. (1)

The only question raised by this appeal was whether a bridge

(1) [1907] 1 Ch. 437.

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was a disturbance of an ancient ferry. The facts are given in greater detail in the report of the case in the Court below, but the following summary is considered sufficient for the purposes of this report:—

The plaintiff claimed to be the owner of an ancient boat ferry across the river Wye at Brockweir, in Gloucestershire, connecting the highway leading to the village of Brockweir with the highway on the Monmouthshire side leading to Tintern and Monmouth. A committee of landowners, represented by the defendant, built a bridge twenty feet wide for vehicular and passenger traffic across the Wye, sixty yards below the plaintiff's ferry, with the result that the public altogether ceased to use the plaintiff's ferry, and from the day the bridge was opened the plaintiff never had a paying passenger to ferry across the river.

The present action was brought to restrain the interference with the ferry by the bridge.

Neville J. held that the bridge was not a disturbance of the ferry, and that the ferry owner had no remedy. From this portion of the judgment the plaintiff appealed.

Bailhache, for the appellant. A right of ferry, like the present, may not be disturbed by a rival ferry or a footbridge, unless there has been a substantial change in the surroundings of the ferry or of the neighbourhood, and it is not suggested here that there has been any material change in the condition of this neighbourhood. It is not a disturbance of the ferry to cross the river by means of a railway bridge, and the provision of a footbridge by a railway company as a means of access to their own station is no interference; but cases of this kind were held to be no disturbance of the ferry in consequence of a change in the condition of the neighbourhood, or improved means of locomotion since the grant of the ferry.

The dictum of Blackburn J. in *Reg.* v. *Cambrian Ry. Co.* (1) is in favour of the appellant, where he says: "It is well established that if that right is interfered with, without the authority of an Act of Parliament, by something which carries passengers across so close to it as to disturb the right, an action

(1) L. R. 6 Q. B. 422, 430.

would lie for that disturbance." After pointing out that all the earlier authorities were cases of disturbance by boats, he goes on: "But I cannot bring my mind to doubt the principle that if a bridge were to be erected across a ferry, and people were to go across the bridge, and consequently the bridge would have the effect of disturbing the owner of the ferry in his right, he would be entitled to bring an action on the case, and to recover damages." This part of the judgment was not overruled by *Hopkins* v. *Great Northern Ry. Co.* (1), though there are observations by Mellish L.J. in that case which are in conflict with the dictum of Blackburn J., but they were not necessary for the decision of that later case.

In *Hopkins* v. *Great Northern Ry. Co.* (1) the only change of circumstances dealt with was the railway bridge, a change which did justify a new way of crossing the river; and later on Mellish L.J. assumes (2) "that an action might, under some circumstances, be maintained by an owner of a ferry for the disturbance of his ferry by the opening of a bridge": so that the very point now under consideration would seem to have been left open.

Payne v. *Partridge* (3) shews that a ferry owner cannot build a bridge in substitution for his ferry, but no inference hostile to the appellant's claim need be drawn from that decision. *Cowes Urban Council* v. *Southampton, &c., Steam Packet Co.* (4) has no application to this case. Anything done with the intention of diverting the traffic from the ferry is an interference with the rights of the ferry owner; the building of this bridge close to the ferry to connect the same highways and to carry the same traffic is in derogation of the ferry owner's rights and an actionable wrong; and where, as here, there is no suggestion of any material change in the surroundings, then the dictum of Blackburn J. in *Reg.* v. *Cambrian Ry. Co.* (5) stands, and entitles this appellant to relief.

Upjohn, K.C., and *F. Thompson*, for the respondents, were not called upon.

(1) 2 Q. B. D. 224.
(2) Ibid. 235.
(3) (1690) 1 Salk. 12; S. C. sub nom. *Pain* v. *Patrick*, 3 Mod. 289.
(4) [1905] 2 K. B. 287.
(5) L. R. 6 Q. B. 422, 430.

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COZENS-HARDY M.R. In this case we have had from Mr. Bailhache an argument of most admirable clearness and of very commendable brevity, and I am quite sure that every point which could be urged in favour of the appellant has been put before us. Notwithstanding that, I cannot bring myself to doubt that Neville J. was perfectly right in the decision which he came to.

Now the franchise of a ferry is a species of property known to the law and entitled to the protection of the law; but it is a very peculiar kind of property, and it must not be so interpreted and fenced round by legal protection as to enable the franchise owner to defeat that which was the only justification for the grant, namely, the public advantage. To use the words of Mellish L.J. in his judgment in the case of *Hopkins* v. *Great Northern Ry. Co.* (1), it is quite clear that is the only ground upon which the franchise right could be obtained. He says (2): "The first grantee of the ferry is supposed to have represented to the Crown that it would be for the public advantage that a ferry should be established in the particular locality, and then, in consideration of the grantee undertaking perpetually to keep up the ferry, the Crown has granted to him the exclusive right of ferrying within certain limits. There is nothing in the nature of this transaction which would lead me to believe that the Crown intended to guarantee, or had power to guarantee, the grantee of the ferry against changes of circumstances and future discoveries of an entirely different description of transit by which ferrying might be superseded." It is conceded on all hands that there is no instance to be found in the books in which the owner of the franchise of a ferry has ever succeeded in obtaining relief, in the nature of damages or injunction, except on the ground that his rights were interfered with by the impeding or obstruction of the landing places or the passage across the river, or where there has been a carrying across by boats by which the ferry owner himself loses. But to say that that doctrine is to be applied not merely when there is a change of local circumstances (and to that extent Mr. Bailhache admits that the ferry owner has no remedy), but where there is a change

(1) 2 Q. B. D. 224 (2) 2 Q. B. D. 231.

of circumstances affecting the whole country, is, it seems to me, to go far beyond anything which has been decided.

Now here what are the admitted facts? There is a ferry for foot passengers across this river, but there was no communication whatever for vehicles from Brockweir across the river except by going round to a bridge some six miles higher up by road. Under those circumstances the owners of land on each side of the river, not requiring any parliamentary sanction, have erected a bridge which, for the first time, makes communication by vehicular traffic possible from one side of the river to the other at this spot. Why does not that come exactly within the principle laid down by Mellish L.J. in *Hopkins* v. *Great Northern Ry. Co.*? (1) It may be that there is no change of circumstances in the immediate neighbourhood—that is one point—but "there is a general change of circumstances in the country at large which renders this new highway necessary, not only or principally for the accommodation of the persons who formerly used the ferry, but for the accommodation of a much larger portion of the public." On that ground I think the decision of the Court below is perfectly right, and I should regret very much if I felt bound to deprive the public of the great advantage which the possession and enjoyment of a bridge of this kind must confer.

I have said this much out of deference to the argument of Mr. Bailhache, but I do not think it is open to us to decide the question otherwise.

I observe the head-note of the report of this case (*Dibden* v. *Skirrow*) in the Court below says (2): "Judgment of Blackburn J. on this point in *Reg.* v. *Cambrian Ry. Co.*, (1871) L. R. 6 Q. B. 422, 430, not followed." It was not a judgment of Blackburn J.; it was merely a dictum. On the other hand, it says: "Dictum of Mellish L.J. in *Hopkins* v. *Great Northern Ry. Co.*, (1877) 2 Q. B. D. 224, 230, approved and followed." As I read the case of *Hopkins* v. *Great Northern Ry. Co.* (3) it goes much further than that, and I consider that the later decision binds us, and that it is based on sound judgment.

(1) 2 Q. B. D. 234. (2) [1907] 1 Ch. 437.
(3) 2 Q. B. D. 224.

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I therefore think that the judgment of the Court below was right, and that this appeal should be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion, and I adopt the whole of the judgment which has just been delivered by the Master of the Rolls.

I realize that the Court has, in this case, to decide between the views held by two such great authorities as Blackburn J. and Mellish L.J. on a point of ancient law. I say this not only because there appears, in my mind, to be an irreconcilability between the opinion of Mellish L.J. in *Hopkins* v. *Great Northern Ry. Co.* (1) and the opinion of Blackburn J. in *Reg.* v. *Cambrian Ry. Co.* (2), but also because in *Hopkins* v. *Great Northern Ry. Co.* (1) the Court of Appeal overruled Blackburn J. and Quain J., who, in the Court below, had decided that case in the opposite way on the strength of *Reg.* v. *Cambrian Ry. Co.* (2)

Now, although I agree with the Master of the Rolls that the greatest possible weight must be given to the opinion of such an authority as Blackburn J., it appears to me that the decision of the Court of Appeal in *Hopkins* v. *Great Northern Ry. Co.* (1), consisting of four eminent judges, is not only binding upon us, but is a right decision. They pointed out that the franchise of a ferry is a monopoly to carry people across the river by ferry; and (although it was perhaps unnecessary to go quite so far for the purpose of that particular case, since there were special circumstances in it which relieved them of the obligation of enunciating the principle to its fullest extent) the language of Mellish L.J. in delivering the judgment of the Court leaves no doubt in my mind as to what was in fact the opinion of the learned judge. He says (3): "It is true that the opening a new bridge might be as prejudicial, or indeed much more prejudicial to the property of the owner of the ferry than the setting up of a rival ferry; but the one does, and the other does not, involve the direct doing of the very thing the exclusive right to do which has been granted to the owner of the ferry; and it seems to be extending the principle of liability for an indirect violation of the

(1) 2 Q. B. D. 224. (2) L. R. 6 Q. B. 422.
(3) 2 Q. B. D. 233.

rights of the owner of a ferry to an unreasonable extent, to hold that it extends to make a person liable to an action, who has not ferried or carried passengers by boat at all." It is clear to me, therefore, that the Court considered that the ownership of a ferry only carried with it the exclusive right to carry people across by boat.

I base my decision in this case on the ground that we are bound by that decision, and I am of opinion that that decision was right. But there seem to me to be special circumstances here which make this case a very strong one, and which would go far to support the judgment of the Court below on independent grounds. In the first place, it is admitted that the building of this bridge was a rightful act. Its user by the owners, and, I presume, by their licensees, could not be complained of. It is built on their own property; and Mr. Bailhache admits that they had a right to build it and use it for their own purposes. The wrong, therefore, can only arise from their having permitted the public to go over a bridge which has been rightfully built, and of which they are the owners. I cannot think that this can be an actionable wrong. The other circumstance is that this ferry was not a ferry for vehicular traffic at all, and, therefore, a bridge could certainly be built for vehicular traffic; and I cannot think that the principles of law would lead us to such an absurdity as saying that you may build a bridge for vehicular traffic, but you must not allow foot passengers to go across it. These, however, are minor points. I prefer to base my judgment on the broader grounds which I have before stated.

FARWELL L.J. I agree. In my view, the case is governed by the decision of the Court of Appeal in *Hopkins* v. *Great Northern Ry. Co.* (1), which, of course, binds us. Mellish L.J. says (2): "Now we apprehend that the owner of a ferry has not a grant of an exclusive right of carrying passengers and goods across the stream by any means whatever, but only a grant of an exclusive right to carry them across by means of a ferry." But inasmuch as it appears to have been doubted whether Blackburn J.'s dictum still remains unaffected by this—and we

(1) 2 Q. B. D. 224. (2) 2 Q. B. D. 230.

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have had an admirable argument by Mr. Bailhache on that point —I should like to add that, considering the matter on principle, it appears to me, if Mellish L.J.'s words are treated simply as dicta, that they are to be preferred to the dictum of that eminent lawyer Blackburn J. In *Attorney-General* v. *Simpson* (1) Lord Macnaghten thus describes ferries: "All ancient ferries have their origin in Royal grant or in prescription, which presumes a Royal grant. A right of ferry is in derogation of common right, for by common right any person entitled to cross a river in a boat is entitled to carry passengers too. Within the limits of an ancient ferry no one is permitted to convey passengers across but the owner of the ferry." I think that Lord Macnaghten meant what he said and no more. He did not mean to include the building of a bridge which would enable passengers to walk across by means of the bridge. Moreover, he points out, what had already been pointed out by Mellish L.J., that it is a Royal grant in derogation of common right. Now it is well settled that the King's prerogative can only be exercised for the public benefit, and not to lead to a wrong. As Mellish L.J. states (2), "There is nothing in the nature of this transaction which would lead me to believe that the Crown intended to guarantee, or had power to guarantee, the grantee of the ferry against changes of circumstances"; and so on. To my mind it would be an invalid grant to exercise the Royal prerogative in such a way as to condemn for all time the inhabitants on the two sides of this river to be conveyed across by means of a ferry boat only, when they had the possibility of having a bridge erected for them. The public benefit means the benefit not merely of the actual inhabitants of the place, though of course it includes them, but persons who may desire to travel in the district, including those who may desire to purchase and develop particular land in the district. To my mind it would be extravagant to say that a man who had got a Royal grant centuries ago for a ferry which was then for the public benefit, because it enabled persons to cross from one side of the river to the other, is to be enabled to render sterile a large portion of the land for the benefit of his own ferry. The reasoning of Mellish L.J.'s judgment appears

(1) [1904] A. C. 476, 490. (2) 2 Q. B. D. 231.

to me to shew conclusively that Blackburn J.'s dictum cannot be supported. In the present case we have the additional circumstance that the ferry did not take vehicular traffic and the bridge does; and, as has been said by my brethren, it would be really too cruel to condemn vehicles to go six miles round instead of having the benefit of this bridge in order to preserve the rights of this ancient ferry.

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I entirely agree with the order in the Court below, and I come to the same conclusion as my brethren.

Solicitors: *Doyle, Devonshire & Co., for Williams & Sons, Monmouth; Gamlen, Burdett & Co., for Evans & Evill, Chepstow.*

W. C. D.

CHALLONER *v.* ROBINSON.

[1907 C. 1886.]

C. A. 1907 NEVILLE J. *July* 5, 30. C. A. *Oct.* 26, 28; *Nov.* 1.

Distress—Goods of Underlessee—Distress for Rent due from Head Lessee—Exemptions—Proprietary Club—Public Trade—Pictures sent for Exhibition and Sale—"Managed" in the Way of Trade—Privilege from Distress.

The plaintiff was the proprietor of the United Arts Club; he was tenant from year to year of the club premises as underlessee; he undertook all the liabilities of the club and received all the profits. One of the objects of the club was to hold exhibitions of pictures sent in by members of the club, mostly for sale on commission, the plaintiff receiving a commission of 10 per cent. as his profit. The club was managed by a committee, of which the plaintiff was a member, and the exhibitions were managed by a picture committee. Only members or associates of the club could send pictures, and the exhibitions were not open to the public on payment, but to persons introduced by members or invited. The defendants, as superior landlords, had put in a distress for rent due from the lessee, and had seized certain pictures then on the club premises, the property of members, which had been sent in for exhibition and sale. In an action by the plaintiff to restrain the defendants from proceeding with the distress:—

Held by Neville J., that the pictures were liable to distress unless the plaintiff could bring his case within the exceptions laid down in *Simpson* v. *Hartopp*, (1744) Willes, 512; 1 Sm. L. C. p. 437 (11th ed.), as "things delivered to a person exercising a public trade to be . . . . managed in the way of his trade or employ." In the present case the plaintiff was not carrying on the trade of a commission agent with all

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who chose to deal with him; his trade was essentially a private trade, and for this reason the pictures were not within the exemption.

Held on appeal, that it was not necessary on the facts to consider the meaning of the words "public trade," but that the word "managed" must be taken to include, if not to be equivalent to, "disposed of"; that the pictures were not delivered to the plaintiff, but to the picture committee, and even if they were delivered to the plaintiff, they were not delivered to him "to be managed in the way of his trade," which was that of a club proprietor, and not that of a picture dealer; that the plaintiff could not be said to "manage" the pictures, which, according to the rules of the club, were under the management of the committee. On these grounds, therefore, the plaintiff's action failed, and the appeal must be dismissed.

The words used by Willes C.J. in *Simpson* v. *Hartopp* must be taken to define and limit precisely the things privileged from distress, and the Court cannot go beyond the terms in which that privilege is defined.

MOTION.

This was an application for an interim injunction, which raised the question as to the right of the defendants, as the superior landlords of premises in King Street, St. James's, to whom arrears of rent were due, to levy distress upon certain pictures the property of various artists, and in the possession of an underlessee of part of the premises when the distress was put in.

The plaintiff was the proprietor of a proprietary club, called the United Arts Club; he was tenant from year to year of, and occupied for the purposes of the club, certain rooms forming part of 26, King Street, St. James's, known as Willis's Restaurant, under an agreement with Edouard Willis's Restaurant, Limited, who were the lessees of the restaurant under a lease for a long term of years from the defendants at a rental of 1250*l.* per annum. The agreement with the plaintiff stated that it was intended that the premises should be used by the United Arts Club, and the rent payable by the plaintiff varied according to the numbers of the club, with a maximum of 1200*l.* per annum. The club consisted of some 700 members. The plaintiff undertook all the liabilities of the club and received all the profits, but the management of the club was in the hands of the committee, of which he was a member.

One of the objects of the club was to facilitate the sale of pictures and other works of art by the members of the club, and for this purpose constant exhibitions were held. Pictures and

other articles exhibited were sold by the club, who retained a commission of 10 per cent., which belonged to the plaintiff as part of his profits. Only members of the club and associates, who paid a guinea a year for its privileges, could send pictures or works of art to the exhibitions, which were not open to the general public on payment, but only to persons introduced by members or invited; numerous invitations were, however, issued.

In May, 1907, the defendants put in a distress for six quarters' rent due to them from Edouard Willis's Restaurant, Limited, and seized certain pictures which had been sent to one of the club exhibitions then being held by the members.

No rent was at this time due to the lessees from the plaintiff.

On June 17, 1907, the plaintiff commenced the present action for an injunction to restrain the defendants from proceeding with the distress on the plaintiff's goods, and from selling the said goods or dealing with the same or remaining in possession thereof, and for damages.

In the view taken of the case in the Court of Appeal the following rules of the club are material:—Rule 2: "The club shall be international, social, non-political, and proprietary. The proprietor undertakes all the responsibility to the members, the regulation of all entrance fees and subscriptions, and the payment of all costs and expenses of the club, and no member of the club or of the committees shall ipso facto be under any liability whatever, or become liable or responsible for any expenses in respect of the club." Rule 4 defined the governing body, the proprietor being an ex officio member of all committees. Rule 7: "The election of members and the general management of the club shall be vested in an executive committee of eight members elected by the general committee and of the chairman or some other member of every other club committee." Rule 11 provided that "the election of members by the executive committee shall be by ballot, and each election shall remain in force for one year only. All members shall be subject to re-election by the executive committee annually unless they shall have given notice of resignation before the 1st of December." Rule 15 provided the amount of the annual subscription. Rule 17

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provided for notification of the election of the member by the secretary. Rule 21 provided: "Members shall be allowed to introduce friends into the club-house and dining-room for meals, and to otherwise use the club under such restrictions as may from time to time be determined by the executive committee, who shall have power in the interests of the club to forbid the introduction of any person or persons without assigning any reason for so doing." Rule 30: "Every possible care will be taken of all exhibits sent in by members, but the club will not be responsible for any injury or loss." Then came certain rules, which were headed "Picture Exhibition Rules," the first of which was: "The entire management of the pictures and their exhibition shall be vested in the picture committee, who shall judge and select the pictures, and whose decision shall be final." Rule 5: "No work can be removed until the close of the exhibition." Rule 6: "Every possible care will be taken of works sent in for exhibition, but the club will not hold itself liable for any injury or loss." Rule 8: "A cheque will be forwarded to the exhibitor for pictures sold, less 10 per cent. commission, directly the amount has been received from the purchaser. The commission will be charged whether the sale has been effected by the club or by the exhibitor. Works sent in for exhibition must be delivered at the club free of charge and without cases. All works must have a back adhesive label and hanging front label, giving the title of the work, name and address of the artist, and price, to be accompanied by a form duly filled up. Labels and forms can be obtained from the secretary." Pictures exhibited were not necessarily for sale. The printed label supplied by the club expressly stated "Please insert price if the picture is for sale." Cheques were to be made payable to the United Arts Club. Invitations to view the exhibitions were issued by the committee.

The plaintiff now moved for an interim injunction in the terms of his writ. At the hearing of the motion the defendants waived any objection on the ground that the pictures seized did not belong to the plaintiff, but to the artists who sent them, and consented to the case being determined as between them and the artists.

The motion was opened on July 5, when it stood over for further evidence, and was finally disposed of on July 30.

Jenkins, K.C., and *Foà*, for the plaintiff. The plaintiff in this case was carrying on in the name of the club of which he was proprietor the business of taking in pictures for sale on commission. The goods are therefore exempt from distress, because they were delivered to him to be dealt with in the way of his trade: *Miles* v. *Furber*. (1)

In *Simpson* v. *Hartopp* (2) the exemption is stated to be "things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade." But this definition of the exemption is a dictum only; the decision of the case did not depend on it. There has never been a judicial definition of the word "public," and the exemption has been extended from time to time. In *Gibson* v. *Ireson* (3) the judges refused to define the word, and, indeed, said they did not know what it meant. There are three possible definitions: (1.) where the trader is bound to deal with everybody, as a common carrier; (2.) where the trader professes to deal with everybody; (3.) where, though he is not obliged and does not profess to deal with everybody, he does in fact deal with large numbers of the public. It has long been decided that the exemption is not confined to (1.), and we submit that definition (3.) is right, because the real ground of the exemption is that it is beneficial to the public that trade should be freely carried on.

In the definitions in the older books there is no statement that the trade need be public: see Brooke's Abridgment, tit. Distress, s. 71; Co. Litt. 47a; Comyns' Digest, Distress, C. (5th ed. vol. iii. p. 497). The word first occurs in *Gisbourn* v. *Hurst* (4), and there it is not intended to limit the definition. In *Adams* v. *Grane* (5) Bayley B. says "the privilege has from time to time been increased in extent, according to the new modes of dealing established between parties by the change of times and circumstances." A proprietary club is not in itself new, but there has

(1) (1873) L. R. 8 Q. B. 77.
(2) Willes, 512; 1 Sm. L. C. 11th ed. p. 437.
(3) (1842) 3 Q. B. 39.
(4) (1709) 1 Salk. 249.
(5) (1833) 3 Tyr. 326; 1 Cr. & M. 380.

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been a very great development of such institutions; their use as a means of selling pictures is new, and as beneficial to the public as any other trades which have been protected.

In *Parsons* v. *Gingell* (1) Coltman J. said that the trade of a livery stable keeper was sufficiently "public" to come within the exemption, though for other reasons the carriage standing there was held not to be exempt. The trades of a butcher, *Brown* v. *Sherill* (2), and a commission agent, *Findon* v. *M'Laren* (3), have been held to be public trades. The distinction is between a trade carried on with the public, or any considerable number of the public, and a mere agency. In *Tapling & Co.* v. *Weston* (4) the name of the principal was on the door, and the plaintiff was held to be a mere agent. In *Von Knoop* v. *Moss* (5) an artist was held not to be a public trader, and in *Edwards* v. *Fox* (6) a restaurant keeper who took in certain pictures to sell on commission was held not to be carrying on the trade of a commission agent.

Peterson, K.C., and *Whinney*, for the defendants. *Simpson* v. *Hartopp* (7) has always been treated as laying down an exact definition of all the cases in which chattels found on the premises of a tenant are exempt from distress. The word "public" is a necessary part of the definition, and cannot be omitted. *Gisbourn* v. *Hurst* (8) explains the meaning of "public," for the Court held that "any man undertaking for hire to carry the goods of all persons indifferently is a common carrier" for the purpose of the exemption. The plaintiff does not offer to sell all pictures indifferently on commission. In *Muspratt* v. *Gregory* (9) it is distinctly laid down that the exemption cannot be extended. In *Lyons* v. *Elliott* (10) Blackburn J. (as he then was) says that the ground of the exemption is public policy for the benefit of trade. The question, therefore, is whether the public will benefit. In this case the public cannot possibly benefit; the benefit, if any, is to the members of the club, a very limited

(1) (1847) 4 C. B. 545.
(2) (1834) 2 Ad. & E. 138.
(3) (1845) 6 Q. B. 891.
(4) (1883) Cab. & E. 99.
(5) (1891) 7 Times L. R. 500.
(6) (1896) 60 J. P. 404.
(7) Willes, 512; 1 Sm. L. C. 11th ed. p. 437.
(8) 1 Salk. 249.
(9) (1836) 1 M. & W. 633; (1838) 3 M. & W. 677.
(10) (1876) 1 Q. B. D. 210, 214.

class, and not even a particular section of the public. In *Clarke* v. *Millwall Dock Co.* (1) the exemption is recognized, but Lord Herschell L.C. says that the person claiming exemption must bring himself within the exact words of the rule. In the passage quoted from Co. Litt. 47a, he is giving the reason for the rule, not stating the rule itself, and that accounts for the omission of the word "public." The rule is fixed, and all the cases shew that the Courts will not extend it.

Jenkins, K.C., in reply.

NEVILLE J., after stating the facts, continued:—Now this is the year 1907, and it seems to me extraordinary that it should be possible in a country which boasts of civilization, which purports to protect the property of the law-abiding citizen, to raise such a question. But so it is. The rule that the landlord is entitled to distrain on the property of third persons upon the premises, subject to certain exceptions, has up to the present day escaped the zeal of the legal reformer, and therefore I have to deal with the law as I find it, and I find that if the present works of art are to claim exemption from distress, they being where they are and the rent being in arrear, their owners must bring themselves within one of the exceptions laid down in the case of *Simpson* v. *Hartopp* (2), and the only way in this case in which they could bring themselves within an exception would be by shewing that they were delivered to the club, or to the proprietor of the club (I think it must be to the proprietor of the club, because the club itself is carrying on no trade), for the purposes of his trade, his trade being a public trade.

It seems to me that the whole question narrows itself down to this, whether the circumstances which I have referred to justify me in declaring that the proprietor is carrying on a public business as commission agent under which he sells these pictures for commission. Having regard to the frequent statement of the exception by judges of the highest authority, it is impossible for me to ignore the use of the word "public." Some meaning must be attached to the word "public." It has been held that it

(1) (1886) 17 Q. B. D. 494.
(2) Willes, 512; 1 Sm. L. C. 11th ed. p. 437.

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is not confined to cases such as those of an innkeeper or common carrier, where all the public have a right to deal with the trader. But it has been frequently stated—and it seems to me accurately stated—that "public" must mean a trade which is open to all members of the public prima facie.

Here it seems to me that, on the face of the thing, this, if it be a trade, is essentially a private trade, and that I am not entitled to say that these pictures are exempt from distress, inasmuch as, in my opinion, they do not come within the exception with regard to public trade, nor indeed within any other exception. I must therefore make no order upon the motion. The costs may be made costs in the action.

J. R. B.

C. A. The plaintiff appealed. The appeal was argued on October 26 and 28.

Jenkins, K.C., and *Foa*, for the appellant, adopted the same line of argument as that used in the Court below on the question of the proper meaning to be attached at the present time to the words "public trade" in the exception stated in *Simpson* v. *Hartopp* (1), but as the Court of Appeal did not consider it necessary, in their view of the facts, to deal with this question, the argument on this point is not repeated. The following additional authorities were, however, cited: *Fowkes* v. *Joyce* (2); *Joule* v. *Jackson* (3); *Rede* v. *Burley* (4); *Gorton* v. *Falkner* (5); *Francis* v. *Wyatt* (6); *Gilman* v. *Elton* (7); *Wickenden* v. *Webster*. (8)

The law can be modified to meet the change of circumstances brought about by lapse of time. This idea of using a proprietary club as a means of selling pictures is novel, but if the policy of the exemption is the protection of trade, then there is no reason why the exemption should not be extended to meet a case of this kind.

(1) Willes, 512; 1 Sm L. C. 11th ed. p. 437.
(2) (1689) 2 Vern. 129.
(3) (1841) 7 M. & W. 450.
(4) (1598) Cro. Eliz. 596.
(5) (1792) 4 T. R. 565.
(6) (1764) 3 Burr. 1498.
(7) (1821) 3 Brod. & B. 75.
(8) (1856) 6 E. & B. 387.

[FLETCHER MOULTON L.J. I doubt very much whether these pictures can be said to have been in the possession of the plaintiff, or to have been delivered to him; they were delivered to the club to be "managed" by the club.]

The plaintiff is the proprietor of this club; he is, in fact, the club so far as possession is concerned, and delivery to the club is delivery to the plaintiff. The artists have parted with possession by sending the pictures to the plaintiff for exhibition and sale. This is only a novel way of earning money by the sale of pictures; the plaintiff's is none the less the trade of a picture dealer because it is mixed up with the business of a proprietary club. The plaintiff is ex officio member of all committees, and is probably the guiding spirit on most of them, so that practically the plaintiff manages this business. The position of the owner of a proprietary club and of the members is discussed in *Baird* v. *Wells*. (1) This point was not taken in the Court below, but on the rules governing this and other proprietary clubs these pictures have been delivered to the plaintiff to be "managed in the way of his trade."

Montague Lush, K.C., Peterson, K.C., and *Whinney*, for the respondents. In *Clarke* v. *Millwall Dock Co.* (2) Lord Herschell lays it down that the words of this exception are not to be extended; and in *Muspratt* v. *Gregory* (3) it is stated to be a binding exposition of the law. In the present case these pictures —(1.) have not been delivered to the plaintiff, but to the club; (2.) on the facts and rules here it is clear that the pictures are "managed" by the picture committee; and (3.) the plaintiff does not carry on the business of picture selling—his business is that of a club proprietor. None of the three conditions presented by the exemption have been complied with. The first two are fatal to the plaintiff's contention, so that it is not necessary to consider the more difficult question of "public" trade. Under the rules the picture committee take charge of the pictures, and all sales are conducted through the secretary of the club, who is the agent of the committee, not of the plaintiff.

In *Edwards* v. *Fox* (4) pictures left with a restaurant keeper

(1) (1890) 44 Ch. D. 661, 675.
(2) 17 Q. B. D. 494.
(3) 1 M. & W. 633, 648.
(4) 60 J. P. 404.

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for sale on commission were held by the Court of Appeal not to be within the exemption because the business was that of a restaurant keeper, not that of a commission agent. No objection is taken that this action is irregular for want of joining the artists.

Jenkins, K.C., in reply. The plaintiff had legal possession of the room in which these pictures were hung; the club and its belongings, including the show of pictures, were his business or trade, which he carries on by means of the committee, and as part of his new scheme. *Edwards* v. *Fox* (1) was a question of fact. There was nothing in that case to indicate that the pictures were not the property of the restaurant keeper; in this case it was common knowledge that the pictures were sent to the plaintiff for exhibition and sale.

Cur. adv. vult.

Nov. 1. The judgment of the Court (Cozens-Hardy M.R., Fletcher Moulton, and Farwell L.JJ.) was delivered by

Cozens-Hardy M.R. The question on this appeal is as to the right of the defendants, the superior landlords of premises in King Street, St. James's, to whom large arrears of rent are due, to levy a distress upon certain pictures and works of art, the property of various artists, which were upon the premises when the distress was put in. By the common law a landlord is entitled to distrain upon goods upon the demised premises without reference to the ownership of the goods. This is the general rule; but it is subject to certain exceptions, which are as well established as the rule itself. Any man claiming the benefit of one of these exceptions must satisfy the Court that his case falls within the exception. No considerations of hardship can avail the man whose goods are thus taken to satisfy a debt which he has not contracted to pay. The rights of the landlord are purely legal, and so are the exceptions. Now in the leading case of *Simpson* v. *Hartopp* (2), decided in the year 1744, Willes C.J. laid down the exceptions with great accuracy, and the words used by him must be taken

(1) 60 J. P. 404.
(2) Willes, 512; 1 Sm. L. C. 11th ed. p. 437.

to define and limit the exceptions precisely. The only one material for this appeal is the second—namely, "things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ." In *Clarke* v. *Millwall Dock Co.* (1) Lord Herschell, dealing with this particular exception, said (2): "I am of opinion that we are limited in this case by the strict terms of the exception. It is very difficult to find any sound principle upon which to explain the law of distress and to support the various decisions. No doubt the general law which enables a landlord to distrain the goods of a third person upon the tenant's premises is, as was said in argument, anomalous, and the exception in question is also anomalous. I think that we cannot go beyond the terms of the definition of the exception." That statement, which is in accordance with a long line of authorities, binds this Court. Some difficulty has been felt with reference to two words in this exception. First, what is the meaning of a "public trade"? Secondly, what is the meaning of "managed"? In view of the facts it is not necessary to consider the first question, upon which we had a very learned argument from Mr. Foà. And as to the second question it is sufficient to say, in favour of the appellant, that according to a long course of decisions the word "managed" must be taken in a wide sense so as to include, if not to be equivalent to, "disposed of." Goods sent to a factor or to an auctioneer are thus held protected. It remains to consider the facts of the present case. Mr. Challoner, the plaintiff, has an agreement for a sub-lease of part of the premises demised by the defendants. The agreement states that it was intended that the premises should be used by the United Arts Club, and the rent payable by the plaintiff varies according to the numbers of the members. The plaintiff entered into possession, and a club has been formed with upwards of 700 members. The documents in evidence explain the objects and nature of the club. It is a proprietary club of a somewhat unusual kind, and Mr. Challoner is the proprietor. [His Lordship read the material rules of the club as set out above, and continued:—]

Although there were at least two exhibitions before the distress

(1) 17 Q. B. D. 494. (2) 17 Q. B. D. 499.

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was put in, only an insignificant number of pictures were in fact sold. Cheques are to be payable to the United Arts Club. Invitations to view the pictures are issued by the committee. The club-house is like an ordinary club-house in most respects. No one but a member or his guests or friends can use the club.

These being the facts, we think the true view is that the pictures were not delivered to Mr. Challoner, but were delivered to the picture committee; and, further, that if, contrary to the above view, they were delivered to Mr. Challoner, they were certainly not delivered to him to be "managed in the way of his trade." His trade or business is that of a club proprietor, and not that of a picture dealer. It cannot be held that he "manages" the pictures in any sense of the word. The pictures are under the "entire management" of the committee according to the rules. It has scarcely been argued that the artists or the club or the picture committee are carrying on any trade or business within the meaning of the exception. We have dealt with the case as though the artists were co-plaintiffs with Mr. Challoner. But, treating the writ as so amended, we can see no legal ground upon which the exemption of the pictures from distress can be supported. In our opinion Neville J. was right in refusing the injunction sought for, though we prefer to base our judgment upon the grounds above stated rather than upon the meaning of the words "public trade." The appeal must be dismissed with costs.

Solicitors: *Tyrrell Lewis, Lewis & Broadbent; Gresham, Davies & Dallas.*

W. C. D.

In re DAVY.
HOLLINGSWORTH *v.* DAVY.

[1906 D. 1712.]

C. A. 1907 *Oct.* 23.

Will—Hotchpot—Share of Residue—Advances in Testator's Lifetime—Rate of Interest.

The general rule of the Court that interest must be calculated at 4 per cent. has not been altered. Interest on advances which have to be brought into hotchpot must still be paid at that rate.

Semble, the same rule does not apply to calculations of interest in cases between tenant for life and remaindermen, such as arose in *In re Earl of Chesterfield's Trusts*, (1883) 24 Ch. D. 643, or *Brown* v. *Gellatly*, (1866) L. R. 2 Ch. 751.

DAVID DAVY, who died on April 19, 1903, by his will gave all his residuary estate to trustees upon trust for sale and conversion, and after payment of debts, &c., to invest the residue and stand possessed thereof for all his children who should attain twenty-one. The shares of daughters were settled by the will; and the testator declared that no gift of any money, securities or other property of any description, or advance or provision, which he had made or should make, or agree to make, to or on behalf of any child or children or grandchild or grandchildren of his should be taken in or towards satisfaction of the bequests or shares or other benefits to which any child or children of his might be entitled under that his will, or be otherwise brought into account, unless after his death there should be found in any of his books or papers some writing clearly shewing that at the time of his death such gift, advance or provision was intended to be taken in or towards such satisfaction as thereinbefore mentioned.

Before the testator's death he had transferred to two of his sons certain colliery shares, and had made an entry in his ledger in each case that these shares should be debited as part of the bequest due to the son under the will, and he had transferred certain debentures to the trustees of a daughter's settlement and made a similar entry.

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After the testator's death certain sums had been paid on account of the shares of some of the children, and certain investments had been appropriated to some of the shares.

This summons was taken out by the trustees of the will for the determination of the questions whether, in dividing the income of the testator's estate, there should be brought into hotchpot interest on the said advances, and at what rate it should be calculated.

It was admitted that interest must be brought into hotchpot, and the only question was what should be the rate of interest.

Joyce J. on January 24, 1907, following the decision of Buckley J. in *In re Whiteford* (1), made an order fixing the interest at 3 per cent. But he expressed no opinion of his own, and suggested that, as there were conflicting decisions, the case should be brought before the Court of Appeal. The testator's children who had not received advances appealed.

Hughes, K.C., and *Baden Fuller*, for the appellants. The old rule that interest on advancements must be calculated at the rate of 4 per cent. has never been altered. It was clearly stated as the settled rule by Jessel M.R. in *Stewart* v. *Stewart* (2) and in *In re Rees* (3), and the rule was adopted by the Court of Appeal in *In re Dallmeyer*. (4) In *In re Lambert* (5) Stirling J. ordered the interest on advances to be paid at the rate of 3 per cent., following some unreported decisions or expressions of opinion of North J. and Kekewich J., but there no one argued for 4 per cent. In *In re Hargreaves* (6) Joyce J. expressed an opinion that Stirling J. had not laid down any general rule in *In re Lambert* (5); but in *In re Whiteford* (1) Buckley J. dissented from that opinion, and Joyce J. has in the present case followed Buckley J.'s opinion rather than his own.

The rate of 3 per cent. has been charged in cases falling within the rule laid down in *In re Earl of Chesterfield's Trusts* (7): see *In*

(1) [1903] 1 Ch. 889.
(2) (1880) 15 Ch. D. 539.
(3) (1881) 17 Ch. D. 701.
(4) [1896] 1 Ch. 372.
(5) [1897] 2 Ch. 169.
(6) (1902) 86 L. T. 43.
(7) 24 Ch. D. 643.

re Goodenough (1) and *Rowlls* v. *Bebb* (2); but in the latter case the point was not discussed, the Treasury, whose interest it was that a higher rate should be charged, not pressing the claim. It has also been applied in cases coming within the principle of *Brown* v. *Gellatly* (3): see *In re Woods* (4); but in both those classes of cases the question between tenant for life and remainderman is decided upon a merely imaginary calculation, and the investments are merely notional, and those cases rest upon a different principle from the case of interest on advancements, which ought to follow the same rule as is established in the case of legacies: *In re Farnham's Settlement.* (5) Four per cent. was allowed on moneys paid to a tenant for life in recoupment of expenditure. There is therefore no general alteration of the rule.

Harman (*Micklem, K.C.*, with him), for the respondents. The general rule has been altered to 3 per cent. in all cases where the Court directs interest to be charged, except where, as in the case of legacies, it is fixed by statute. The alteration is recognized in Lewin on Trusts, 11th ed. p. 392, and by the authorities. In *In re Barclay* (6) Stirling J. ordered interest at 3 per cent., and said he did so "In accordance with what I now understand to be the practice that has been adopted at any rate by all judges of first instance in this Division."

Hughes, K.C., in reply.

COZENS-HARDY M.R. This is a case in which Joyce J. has given a decision to the effect that interest at 3 per cent. only, and not at 4 per cent., ought to be calculated on advances made by the testator to his children in his lifetime, which are brought into hotchpot, for the purpose of adjusting the rights of the parties.

I gather that that decision was really contrary to the view entertained by the learned judge, for he had himself in the case of *In re Hargreaves* (7) a few years before given a reasoned judgment in which he expressed his view that the rule was that

(1) [1895] 2 Ch. 537.
(2) [1900] 2 Ch. 107.
(3) L. R. 2 Ch. 751.
(4) [1904] 2 Ch. 4.
(5) [1904] 2 Ch. 561.
(6) [1899] 1 Ch. 674, 686.
(7) 86 L. T. 43.

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4 per cent. was still the rate of interest to be charged. But as a different view had been held by other judges, particularly by Buckley J. in the case of *In re Whiteford* (1), and as a similar view had been expressed by Stirling J. in the case of *In re Lambert* (2) (although I do not think that that case can be regarded as a distinct decision on the point), Joyce J. considered it desirable that the point should come before the Court of Appeal for our decision. The undisputed rule of the Court in adjusting the rights of parties in a case like the present was—and has been from the earliest days so far as I am aware, and so far as counsel are aware—that the rate of interest should be 4 per cent. That rate of interest is laid down by rules having statutory force, and also in some cases by statute apart from rules.

Perhaps the nearest analogy is that of legacies. Order LV., r. 64, provides as follows: "Where a judgment or order is made directing an account of legacies, interest shall be computed on such legacies after the rate of 4 per cent. per annum from the end of one year after the testator's death, unless otherwise ordered . . . ." That is a rule which is still in force, and it cannot be altered by judicial decision. I cannot find, nor have counsel referred to, any decision of the Court of Appeal which in any way touches the present question. And I think it would be dangerous and altogether unwise for us now to lay down that a rule which has been in existence for so long a period should be modified by reducing the rate to 3 per cent. I do not believe that the rate of interest receivable from trust securities had anything to do with the foundation of this rule. Certainly the Court could not now say that the rate ought to be 3 per cent., when, if the present state of things continues much longer, it may be that trust investments will produce a higher rate.

It will be safer to hold that, as to the interest payable on advancements, 4 per cent. is still the rate, as was laid down by Sir George Jessel M.R. in *Stewart* v. *Stewart*. (3)

Nothing I have said must be taken to be intended to affect in any way questions arising in cases like that which arose in

(1) [1903] 1 Ch. 889. (2) [1897] 2 Ch. 169.
(3) 15 Ch. D. 539.

In re Earl of Chesterfield's Trusts (1), which seem to me to turn on entirely different considerations.

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FLETCHER MOULTON and FARWELL L.JJ. agreed.

Solicitors: *Gribble, Oddie, Sinclair & Johnson, for Benson, Burdekin & Co., Sheffield.*

J. R. B.

d and applied. Re GEE. All E.R. 498. | *Applied. Re* GEE. [1948] 1 Ch. 284

In re DOVER COALFIELD EXTENSION, LIMITED.

C. A. 1907 — *Nov.* 7.

[0070 of 1903.]

Company—Director's Remuneration—Qualification Shares received as Trustee—Liability of Director to account to Cestui que Trust for Remuneration.

The D. Company transferred certain shares which it held in the K. Company to C., one of its directors, in order to qualify him to become a director of the K. Company, the intention being that C. should represent the interests of the D. Company on the board of the K. Company, and C. executed a declaration of trust of the shares in favour of the D. Company:—

Held, that the remuneration received by C. as director of the K. Company was not profit received by him from the use of the property of the D. Company, and that C. was under no liability to account for that remuneration to the D. Company.

Decision of Warrington J., [1907] 2 Ch. 76, affirmed.

APPEAL from a decision of Warrington J. (2)

In June, 1901, the Dover Coalfield Extension, Limited, hereinafter called the Dover Company, purchased 5105 shares of 1*l.* each in the Consolidated Kent Collieries Corporation, Limited, hereinafter called the Kent Company.

On February 11, 1902, W. J. Cousins and C. F. R. Fonrobert, who were directors of the Dover Company, were elected directors of the Kent Company, the object of their election being that they might look after the interests of the Dover Company in the affairs of the Kent Company.

The articles of association of the Dover Company provided as follows:—

"90. No director shall be disqualified by his office from contracting with the company either as vendor, purchaser, or

(1) 24 Ch. D. 643. (2) [1907] 2 Ch. 76.

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otherwise, nor shall any such contract or arrangement, or any contract or arrangement entered into by or on behalf of the company in which any director shall be in any way interested be avoided, nor shall any director so contracting, or being so interested, be liable to account to the company for any profit realized by any such contract or arrangement by reason only of such director holding that office, or of the fiduciary relation thereby established, provided that no such director shall vote in respect of any such contract or arrangement in which he is personally interested, and if he does so vote his vote shall not be counted, and that the nature of his interest, where it does not appear on the face of the contract, is disclosed by him to the board prior to the contract or arrangement being determined on, if his interest then exists, or in any other case at the first meeting of the board after the acquisition of his interest.

"91. If any director shall be called upon to go or reside abroad on the company's business, or otherwise perform extra services, the board may arrange with such director for such special remuneration for such services either by way of salary, commission, or the payment of a settled sum of money as they shall think fit, and the directors may be repaid any travelling or other expenses incurred in connection with the business of the company."

The articles of association of the Kent Company provided as follows:—

Article 86: "The qualification of a director . . . . shall be the holding of shares in the company of the nominal amount of 1000*l*. A director may act before acquiring his qualification."

Article 87: "The board shall be paid out of the funds of the company by way of remuneration for their services the sum of 3500*l*. a year and such further sum (if any) as the company in general meeting from time to time determine, and such remuneration shall be divided among them in such proportions and manner as the board may from time to time determine."

Article 89: "The office of director shall be vacated: . . . . (*d*) if he cease to hold the required amount of shares or stock

to qualify him for office or do not acquire the same within one month after election or appointment . . . ."

On February 28, 1902, a board meeting of the Dover Company was held, at which Cousins and Fonrobert were the only directors present (there being at that time one other director), when the following resolution was passed: "The chairman" (Cousins) "reported that he and M. Fonrobert had been elected directors of the Consolidated Kent Collieries Corporation, and under the articles of association of that company a director was bound to obtain his qualification of 1000 shares within one month after election, and requested that 1000 of the shares of the corporation now standing in the names of the chairman and secretary, as trustees for that company, should be transferred to the chairman, and that a further 1000 of such shares should be transferred to M. Fonrobert, to provide such qualification, upon the terms that the transferees should execute a declaration of trust in favour of the company. Resolved, that such request be acceded to on the terms above mentioned, and that the transfers and declaration of trust be executed. The transfers and declaration of trust were executed accordingly."

In pursuance of that resolution 1000 of the 5105 shares were transferred into the name of Cousins, and another 1000 of the shares were transferred into the name of Fonrobert. By the declaration of trust, which was dated February 28, Cousins and Fonrobert acknowledged that they respectively held the shares in the Kent Company, the numbers of which were set opposite to their respective names in the schedule, as trustees for the Dover Company; and they thereby declared that they respectively would at all times thereafter "stand possessed of the said shares and of all dividends bonuses and other rights and privileges accruing or to accrue due in respect or in right of the said shares," and would dispose of the same as the Dover Company should from time to time direct.

Cousins acted as a director of the Kent Company, and continued to hold the 1000 shares which he had thus acquired until February, 1903, when they were retransferred to the Dover Company. Meanwhile, on December 30, 1902, there had been transferred to him 1200 other shares of the Kent Company, and

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that transfer was registered on the same day, so that he had on December 30, 1902, become entitled from another source to the necessary qualification as a director.

On December 29, 1902, a balance-sheet made up to November 29, 1902, was circulated amongst the shareholders, in which there appeared on the assets side the cost of 5105 ordinary shares in the Kent Company, followed by this note: "Of these shares 1000 are registered in the name of Mr. W. J. Cousins and 1000 in the name of Monsieur C. F. R. Fonrobert, in order to qualify them as directors of the Consolidated Kent Collieries Corporation, Limited, and thus enable them to represent the interests of this company upon that board"; and in the certificate of the auditors to the balance-sheet they stated that Cousins and Fonrobert had executed a declaration of trust of these shares and had deposited with the company in each case the share certificates and a blank transfer of shares. The balance-sheet with the auditors' certificate was laid before a meeting of the Dover Company. Notice was taken of the statements therein as to these 2000 shares, and some question was raised on two occasions at meetings of the company held to consider the balance-sheet, but ultimately the matter dropped.

On March 31, 1903, an order was made for the winding up of the Dover Company.

A misfeasance summons was taken out by the liquidator on March 8, 1905, against Cousins and Fonrobert for a declaration that they were liable to contribute to the assets of the Dover Company the respective sums of 889*l.* 1*s.* 8*d.* and 827*l.* 17*s.* 7*d.* received by them as remuneration for acting as directors of the Kent Company and for payment of those sums to the liquidator.

The summons had not been served on Fonrobert, and was not therefore proceeded with against him.

Warrington J. held that the remuneration was received by Cousins for work done as director of the Kent Company, and was not profit received by him from the use of the Dover Company's shares, and that consequently he was not liable to account for such remuneration to the liquidator.

The liquidator appealed.

Hon. E. C. Macnaghten, K.C., and *Martelli*, for the liquidator. Cousins, as director of the Dover Company, made use of the property of that company to enable him to become a director of the Kent Company. But if an agent, by the use of the property of his principal or from his position as agent, obtains a post of profit, he cannot hold that profit for himself unless he gets the sanction of his principal to do so, but must bring it into account: *Dean* v. *MacDowell.* (1) The intention was that Cousins should represent the interests of the Dover Company on the board of the Kent Company, and if he had meant to claim any additional remuneration for the services so rendered, he ought to have made some arrangement with the Dover Company under articles 90 and 91. He is not entitled to any remuneration beyond what his principal agrees to pay him. He is, therefore, accountable to the liquidator for the fees which he received as director of the Kent Company during the time which he held his qualification shares from the Dover Company.

Arnold Statham, for creditors who had obtained leave to intervene in the liquidation.

Cave, K.C., and *E. G. Palmer*, for Cousins.

COZENS-HARDY M.R. I must say this is a very plain case. Certain shares in the Kent Company were held by the Dover Company. These shares were put with perfect propriety in the names of the respondent Cousins and another gentleman. That was communicated to the Dover Company in general meeting in plain language, and, even apart from that, it seems to me to be a perfectly proper transaction; and, indeed, there was no suggestion of any impropriety in it. In that state of things, of course these gentlemen could not claim the dividends arising from the shares standing in their names; but they became by virtue of that circumstance in the position of being eligible to act as directors of the Kent Company, and they were entitled to remuneration for the services so rendered, not from the Dover Company, but from the Kent Company. The money was received, not by virtue of the shares held by the Dover Company, but by virtue of a separate contract with the Kent Company; and to hold that the

(1) (1878) 8 Ch. D. 345, 354.

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mere fact that a director of a company holds his qualification shares as trustee for another company renders him accountable to the second company for the director's fees which he earns would, in my opinion, be going further than either authority or principle justifies the Court in going. The appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. Counsel for the appellant have frankly stated that they make no complaint in respect of these shares being placed in the names of these directors, nor do I see how they could do so, because it was plainly stated to the company at the next general meeting that this had been done, and no objection was made. Therefore, by no improper use of the shares, these two gentlemen have become persons capable of performing the services of directors of another company for which they have received remuneration. I cannot see that they are trustees of the original company in respect of the wages which they thus receive.

FARWELL L.J. I agree. The claim is that because these respondents hold their qualification shares as trustees for the Dover Company, of which company they happen to be also directors, they are accountable to that company for money paid for work done and services rendered by them as directors of the Kent Company. They did the work; they are entitled to the money. The answer to the suggestion that they could not have earned the money unless they had been qualified to act as directors by shares belonging to the Dover Company is that they became directors at the request of that company.

Solicitors: *Pilgrim & Phillips; Paddison, Trevor & De La Chapelle; E. A. Fuller.*

H. B. H.

C. A.
1907
Nov. 12.

In re ROBY.

HOWLETT *v.* NEWINGTON.

[1907 R. 413.]

Will—Executors—Gift of Residue—Express Trust—Advancements to Children by Testator—Partial Intestacy—Next of Kin—Hotchpot—Statute of Distributions (22 & 23 *Car.* 2, *c.* 10), *s.* 5—*Executors Act*, 1830 (11 *Geo.* 4 & 1 *Will.* 4, *c.* 40), *s.* 1.

In applying the analogy of the Statute of Distributions to the case of a partial intestacy of the beneficial interest in undisposed-of residue, the rule of equity still is that advances made by the testator in his lifetime need not be brought into hotchpot.

Vachell v. *Jeffereys*, (1701) Prec. Ch. 170; *Wheeler* v. *Sheer*, (1730) Mos. 301; and *Cowper* v. *Scott*, (1731) 3 P. Wms. 119, examined and followed.

The Executors Act, 1830, only applies in cases where there is a bare appointment of executors, so that the implication of law has to be resorted to in order to see whether the estate of the testator not otherwise disposed of vests in them beneficially virtute officii.

Williams v. *Arkle*, (1875) L. R. 7 H. L. 606, applied.

Decision of Neville J., [1907] 2 Ch. 84, affirmed.

Appeal from the decision of Neville J. (1)

The questions raised by this appeal were—(1.) whether the hotchpot provisions of s. 5 of the Statute of Distributions applied to a case of partial intestacy; and (2.) whether the Executors Act, 1830, applied to the present will.

The will and the facts are set out in greater detail in the report in the Court below, but the following summary is sufficient for the purposes of this report:—

The testator, who died in July, 1892, devised and bequeathed his residuary real and personal estate to trustees, who were also appointed executors, upon trust for sale and conversion, and as to 1500*l.* (part thereof) upon trust to invest and pay the income to his daughter E. M. Clark for her life, and after her death to divide the capital amongst her issue: and as to the remainder of the residue upon certain trusts for the benefit of his four

(1) [1907] 2 Ch. 84.

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daughters nominatim, including E. M. Clark, and the children of a deceased daughter and their issue.

In November, 1903, E. M. Clark died without issue.

In February, 1905, a new trustee was appointed in the place of one of the original trustees.

On February 22, 1907, an order was made by Swinfen Eady J. declaring that on the true construction of the will, and in the events which had happened, this 1500*l.* passed to the next of kin of the testator as undisposed of by his will.

The next of kin of the testator at the time of his death were his four daughters and the children of the deceased daughter, and, as the testator had made advances during his lifetime to all his daughters, if these advances had to be brought into hotchpot, the children of the deceased daughter would take the whole 1500*l.* to the exclusion of the three surviving daughters, who had thus been advanced in much greater sums.

Neville J. held that the Executors Act did not apply, and that the 1500*l.* must be distributed amongst the next of kin without bringing advances into hotchpot.

The children of the deceased daughter appealed.

Butcher, K.C., and *Gatey*, for the appellants. In all cases of intestacy the Statute of Distributions has to be resorted to in order to ascertain who are entitled, and the shares. Sect. 5 provides for advancements made to the children by the testator in his lifetime being accounted for, to make the shares equal. Where the statute applies, it applies in its entirety.

[FLETCHER MOULTON L.J. On the wording of s. 5, the heir-at-law would seem to be expressly exempted from having to bring advances into hotchpot.

Potts (as amicus curiæ). It appears to have been long ago decided that an advancement to the heir or co-heiresses—*Dillon* v. *Coffin* (1)—otherwise than in land, must be brought into hotchpot: *Phiney* v. *Phiney* (2); *Lord Kircudbright* v. *Lady Kircudbright* (3); note to s. 5 in Chitty's Statutes.

FARWELL L.J. referred to *Smith* v. *Smith* (4) and to *Pratt* v.

(1) (1839) 4 My. & Cr. 647.
(2) (1708) 2 Vern. 638.
(3) (1802) 8 Ves. 51.
(4) (1801) 5 Ves. 721.

Pratt (1), and said question 1 in that case was "whether the eldest son was to be considered advanced in the life of his father"; and the report goes on (2): "To the first question it was said, that an advancement to the eldest son out of the personal estate was as much to be brought into hotchpot, as in the case of the younger children; for the advancement to the eldest son exempted from hotchpot by the statute, is to be out of the real estate; but those who were of counsel for the eldest son insisted, that as he was not to have the ownership, but only the use of the said furniture for his life, that was not to be considered as an advancement within the Act. But the Master of the Rolls held it an advancement pro tanto, to be brought into hotchpot."

COZENS-HARDY M.R., having sent for the registrar's book with the decree made in *Phiney* v. *Phiney* (3), said the words of the decree were fuller than what was given in the report; they were: "The heir as to his personalty is not distinguished from the other children of the testator." That seemed to make the case quoted from Fitzgibbon clear, and it must be taken as settled by authority that the heir must account, like the other children, for advances out of personalty.]

The statute, strictly, only applies to cases of actual intestacy, but Courts of Equity, acting on the analogy of the statute in cases of partial intestacy, where there is an executor, as here, when they bring in the statute as the basis of distribution ought also to follow the method adopted by the statute. The old authorities, such as *Vachell* v. *Jeffereys* (4), *Wheeler* v. *Sheer* (5), *Cowper* v. *Scott* (6), *Walton* v. *Walton* (7), *Farnham* v. *Phillips* (8), and *Freemantle* v. *Bankes* (9), do certainly shew that the rule as to hotchpot was not applied in cases of partial intestacy and undisposed-of residue: but at that time the doctrine as to bringing advances into hotchpot did not apply to shares of residue; that doctrine was upset by *Montefiore* v. *Guedalla* (10), which determined that there could be ademption or satisfaction of a portion

(1) (1731) Fitzgibbon, 284.
(2) Ibid. 285.
(3) 2 Vern. 638.
(4) Prec. Ch. 170; on appeal, (1706) 5 Bro. P. C. 51.
(5) Mos. 301.
(6) 3 P. Wms. 119.
(7) (1807) 14 Ves. 318.
(8) (1741) 2 Atk. 215.
(9) (1799) 5 Ves. 79.
(10) (1859) 1 D. F. & J. 93.

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by a share of residue, and since that case the result of the old authorities ought not to be followed. The old authorities are inconsistent, because if the analogy of the statute is applied to ascertain the persons to take, and the shares, why should not the part that relates to hotchpot be applied also? It is not possible to separate the persons entitled from the shares in which they are entitled. By the old authorities the persons and the proportions are kept, but the question of hotchpot was disregarded, because then there could not be advancement out of residue; the justification for this portion of the decision no longer exists. The observations of Buckley J. in *In re Ford* (1) support this contention, and the observations of Jessel M.R. in *Stewart* v. *Stewart* (2) shew that the law laid down by the old authorities has been altered. By the Executors Act, 1830, a trust is created for the persons entitled under the Statute of Distributions, and the executors are made trustees for them. The Executors Act, 1830, is not confined to cases where there are no trusts: *Love* v. *Gaze*. (3) The comments in *Williams* v. *Arkle* (4) do not apply to the position of the next of kin; the Court did not in that case purport to overrule *Love* v. *Gaze*. (3) The Act necessarily brings in hotchpot.

Jenkins, *K.C.*, and *Potts*, for the respondents, were not called upon.

COZENS-HARDY M.R. This case has been very fully argued by counsel for the appellants, and if instead of being in the year 1907 we had been in the year 1707, it is possible that we might have taken a different view of the present case, but for reasons which I will shortly state I think it is impossible for us to say that the decision of Neville J. was otherwise than correct.

Neville J. says this (5): "In my opinion there is an existing rule that in a case of partial intestacy as to the beneficial interest the doctrine of hotchpot does not apply, and by that rule I am bound." That rule was asserted in language which is direct and unambiguous in the year 1701 in the case of

(1) [1902] 1 Ch. 218, 222; S. C. on appeal, [1902] 2 Ch. 605.
(2) (1880) 15 Ch. D. 539.
(3) (1845) 8 Beav. 472.
(4) L. R. 7 H. L. 606, 615, 629.
(5) [1907] 2 Ch. 87.

Vachell v. *Jeffereys* (1), where there was an intestacy, and one of the daughters had had an advance. There was an intestacy in this sense of the beneficial interest, there being on the language of the will itself sufficient to prevent the executors from taking it beneficially, and the Court first held that the executors did not take it beneficially. Then comes the third question, which was as follows: "Whether the married daughter's portion should be brought into hotchpotch? It was decreed that it should not, but she to have her share with the rest; and the difference as to bringing into hotchpotch was said to be between persons dying wholly intestate, and dying intestate quoad a surplus."

That case went to the House of Lords. It is said with some degree of force that the appeal to the House of Lords was not really addressed to this point, but was addressed to another part of the case. I cannot myself disregard the fact that the House of Lords (2), in reversing another part of the decree in *Vachell* v. *Jeffereys* (1), went on to vary it in that part, and to say that as to the residue (3) the "said decree and proceedings thereupon were to stand: and the surplus of the said testator's personal estate was to be divided in the same manner, as was appointed by the statute for settling intestates' estates."

That does seem to me to be an affirmance by the House of Lords of the principles laid down by the judge who, in the first instance, decided that case.

The matter does not rest there, for in *Wheeler* v. *Sheer* (4), in 1730, Lord King again discussed the question, and, though I agree with the criticisms that have been made on some parts of the judgment, it is impossible to doubt that he did really decide it. He held, first of all, that the custom of York did not apply, because there had been a will giving it to the executors; and then he says (5): "This is not a case within the Statute of Distributions, though I have declared the surplus to be distributed among the next of kin, according to that statute; but I only consider it as to the persons who are to take, but not so far

(1) Prec. Ch. 170.
(2) 5 Bro. P. C. 51.
(3) 5 Bro. P. C. 54.
(4) Mos. 301.
(5) Mos. 304.

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as to disturb the provisions made by Sir George Wheeler, either in his lifetime or by his will."

That question came again before the Master of the Rolls in 1731, *Cowper* v. *Scott* (1), where a very forcible argument was addressed to him, and it was said if the children are within the statute as to one clause, they must be within it as to every clause, "sed curia contra"; and he goes on to say, in words I think I had better refer to (2): "Though this seventh part devised to the son, did, by his dying in his father's lifetime, for necessity's sake become distributable according to the statute, yet I take this not to be in strictness within the same; because here is an executor, and therefore the testator cannot be said to have died intestate; though it is true the executor being but a trustee, is, by an equitable construction, and by means of an accident that has happened since the making of the will, a trustee for the next of kin according to the statute. However this is (as I said) merely through necessity, and because no one else can take: but as to children who were advanced in their father's lifetime, bringing such their advancements into hotchpot, that is to be only in the case of a *total intestacy*, or where the whole personal estate, not where part only, and that perhaps but a very small part (as here), becomes distributable; neither would it be reasonable for the children so to do."

Sir William Grant in 1807, in *Walton* v. *Walton* (3)—though I agree it is a mere dictum—asserted his view of the law in nearly precisely the same terms. I therefore think, that, whatever might be my view of the matter apart from authority, it is impossible for us to hold that the law which has been thus authoritatively laid down for 200 years, can now, in the year 1907, be treated as no longer law. I cannot think that there is any substance in the argument which was addressed to us, that the only reason which could have justified these learned judges in coming to this conclusion was some sort of idea that the doctrine of bringing advances into hotchpot could not apply to a gift of residue, and, that doctrine having been set aside in *Montefiore* v. *Guedalla* (4) fifty years ago, those authorities have

(1) 3 P. Wms. 119.
(2) Ibid. 125.
(3) 14 Ves. 324
(4) 1 D. F. & J. 93.

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to go by the board. I do not know by what process of reasoning the judges arrived at that decision. It seems to me impossible to alter it, unless it can be said that a new law has come in force by reason of the provisions of the statute of 1830. The statute of 1830, so far as it is material, is as follows: It recites that—" Testators by their wills frequently appoint executors, without making any express disposition of the residue of their personal estate: And whereas executors so appointed become by law entitled to the whole residue of such personal estate; and Courts of Equity have so far followed the law as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case they are held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions, if the testator has died intestate: And whereas it is desirable that the law should be extended in that respect; Be it therefore enacted, That when any person shall die, after the first day of September next after the passing of this Act, having by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by Courts of Equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will, or any codicil thereto, the person or persons so appointed executor or executors was or were intended to take such residue beneficially."

The point that thus arises is, Has that statute any application to the present will and to the present fund with which we are dealing? In my opinion it is not open to us to hold that it has. I think that the decision of the House of Lords in *Williams* v. *Arkle* (1), and particularly the speech of Lord Cairns, shews this, that the only object, intention, and effect of that statute was to deprive the executor of that position which he had virtute officii, under which, anybody claiming to get the residue from him had to discover something on the

(1) L. R. 7 H L. 606.

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face of the will to shew that he was intended to be a trustee and not to take beneficially. In any case in which by construction the Courts held before that Act that he was, though a named executor, really a trustee, the Act has no operation; in other words, it only deals with property which the executor could claim to get and retain solely virtute officii. Lord Cairns, in a passage that has been read more than once, puts the matter very clearly (1): "I cannot entertain any doubt that this statute did not introduce any new rule for the construction of wills. It provides that an executor shall be a trustee for the next of kin unless it shall appear by the will that he is to take the residue beneficially. That is to say, he shall no longer take the residue by implication of law. If the residue is given by the will to the executor, the Court must decide the effect of the gift upon the construction of the will, and upon general principles applicable to that construction, just as before the statute it would have construed a similar gift of real estate. The statute therefore has, of necessity, no application where there is an express gift of residue. In my opinion, the statute was intended to apply only in those cases where the rule or presumption of law could be held to operate, and that, where an express devise of residue is found, the meaning of that residuary bequest must be ascertained by the ordinary rules of construction." Lord Hatherley at p. 629, in a passage which I will not read, as it has been read more than once, emphasizes more clearly the law, and on p. 630 says that the Legislature said: "Your merely being appointed executor shall not carry any portion of the personal estate whatever for your own benefit, unless you shew clearly an indication to that effect on the face of the will." It seems to me to be quite plain that before this statute, as now, the executors who are made trustees of this 1500*l.* would have been accountable as trustees, and could not possibly claim the benefit of any beneficial interest whatever in this fund. The Act has no application to a case of this kind. The decision must be given as if there was no such Act. Therefore, I am of opinion the old authorities prevail and the appeal fails.

(1) L. R. 7 H. L. 615.

From what I have said it must not be assumed, as at present advised, that I assent to the proposition that the Act of 1830 justifies the interpretation which counsel has put upon it. It is sufficient to say that the statute is altogether out of place here.

FLETCHER MOULTON L.J. I have somewhat reluctantly come to the same conclusion. I think the best interpretation that I can give to the Act of 1830 is that it was only intended to shift the onus of proof; that it did not apply to a case where there was unquestionably a trust covering the whole estate and the quasi intestacy arose from the fact that those trusts, either by events that had happened after the death or otherwise, did not in fact swallow up the whole estate; that it related in fact only to those cases in which by pure implication of law the common law would have considered a certain portion of the estate passed to the executor. I therefore put that statute on one side, and turn to the question whether, apart from that Act, the division of the portion of this estate which is now comprised in the intestacy should be made subject to the doctrine of hotchpot or not.

On this point I am satisfied that the authorities are in a very unsatisfactory state. Let me first of all refer to the phrase which is used in the statute of 1830, "The person or persons who would be entitled to the estate under the Statute of Distributions"—a phrase which appears in many of the previous decisions, and on the meaning of which those decisions turn. Now I agree with what the late Sir George Jessel said in *Stewart* v. *Stewart* (1), that when property is left in trust for the persons who would be entitled under the Statute of Distributions, it means not only in trust for the people who would come in for a share under the provisions of that statute, but also for the people who would come in and for the shares prescribed by that statute for such people. It is, in my opinion, quite impossible to separate the personality of the people from the shares to which they are entitled, and whether you look at the old decisions or the modern decisions the Courts have never professed to do so. The wife, the children, the grandchildren, the children of the

(1) 15 Ch. D. 539.

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deceased children—all come in; but nobody suggests that they come in equally. It is admitted that (apart from the question of advancement) they come in for the shares to which they would have been entitled under the Statute of Distributions. Therefore, I cannot consider that that phrase means anything other than the people who are so entitled, in the shares to which they are entitled. Therefore, in the cases to which the Act of 1830 applies (which I agree do not include the case before us), the division must be made among the people entitled under the Statute of Distributions according to the shares which they would so get; and when I turn to the Statute of Distributions I find it is perfectly impossible to separate the shares to which they would be entitled from the question of hotchpot. They are mixed up in the same clause, and even in the same sentence. Therefore, by the decision which we are obliged to give to-day, we are saying that children get a different division of the portion falling under such an intestacy according to whether or not the implication of law first passes the property to the executor and then passes it to them, or whether the implication of law does not apply, and it comes to them direct under the trusts of the will. That seems to me a very sad and very absurd conclusion. I see no escape from it, because I agree with the Master of the Rolls that for a very long series of years it has been the custom of the Court of Chancery to direct that in the case of partial intestacy there should be a division among those who are named as next of kin in the Statute of Distributions according to shares which are not such as there named, but which only partly accord with the principles of division laid down by the statute; that is to say, they have kept the proportion but they have suppressed the modification of those proportions by reason of advancement. That was a totally artificial method justified by nothing that I can see in the law or in any other way; and when I turn back to the old decisions it appears to me that those decisions were to a great extent inconsistent with themselves. I find a learned Lord Chancellor says you only look to the Statute of Distributions for the purpose of finding out who are entitled, and you do not look to it for their shares. All I can say is that you do look to it, to a certain extent, for their shares, but not completely; and I

cannot help thinking (although the much weightier authority of the Master of the Rolls is against me on this point) that the opinion formerly held that the doctrine of advancement did not apply to bequests of residue must have influenced them in dividing the intestate estate not only among the people who are entitled, but also in the shares to which they are entitled, under the Statute of Distributions, and yet rejecting everything in that statute that had to do with hotchpot, although it possesses an authority co-ordinate with the provisions which give the proportions. Whether that be so or not I cannot say; but it is clear that for all these years there has been an artificial rule in the Court of Chancery to divide money of this kind in this particular way, neither in accordance with the Statute of Distributions nor with anything else except the rule itself. If that is to be changed, it must be changed by a higher authority than this Court—we cannot now change it. For these reasons I think that the learned judge below was right, and that the appeal must be dismissed.

FARWELL L.J. I agree with the judgment of the Master of the Rolls, and I am glad to be able to say that I do not share the reluctance of my brother Fletcher Moulton L.J., because I should be sorry to think that we are doing anything manifestly unjust. Speaking for myself, I should say that the case was not open to argument, because we are bound by authorities which it is impossible to set aside. Nor do I myself see any fault to find with the authorities. The Statute of Distributions applied only to intestacy. When the testator appointed an executor he was not intestate, and at common law the executor took the whole of his estate. Equity, however, thought that to be hard, and in cases in which there was any ground on the terms of the will for turning the executor by construction into a trustee, the Court seized upon very small indicia of intention so to turn him. Then the question arose, Trustee for whom? Now the Statute of Distributions, as I have already said, does not apply; it is only, therefore, by analogy that it has been brought in at all, and taking the case of *Wheeler* v. *Sheer* (1), which has been so much

(1) Mos. 301.

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commented upon, the Lord Chancellor expressly adopts the rule laid down afterwards in *Bullock* v. *Downes*. (1) The statute is to be read to ascertain the persons to take the shares and the proportion in which they take. The point did not arise so far as I remember in *Bullock* v. *Downes* (1), but in *Wheeler* v. *Sheer* (2) the Lord Chancellor went on to decide that the hotchpot clause of the statute did not apply. That was a decision in 1730. Lord Eldon's decision in *Ex parte Pye* (3) was not till 1811, and the doctrine of advancement and of double portions was perhaps not firmly settled till *Ex parte Pye*. (3) Moreover, Lord Eldon himself in *Ex parte Pye* (3) says (4): "Where a parent gives a legacy to a child, not stating the purpose, with reference to which he gives it, the Court understands him as giving a portion; and by a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion, that the father is paying a debt of nature, and a sort of feeling upon what is called a leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole or in part; and in some cases it has gone a length, consistent with the principle, but shewing the fallacy of much of the reasoning, that the portion, though much less than the legacy, has been held a satisfaction in some instances upon this ground, that the father, owing what is called a debt of nature, is the judge of that provision, by which he means to satisfy it."

I am not altogether surprised that in 1730 the then Lord Chancellor did not adopt, when he had a free hand for the purpose of discovering to whom he should give this personalty, a rule which Lord Eldon speaks of in those terms. It is also well settled that the Court never implies a hotchpot clause in executed instruments. Hotchpot is not a sort of knowledge which is necessarily imputed to every testator; it is an artificial doctrine built up within the Courts, and I speak with some diffidence of dates, but I doubt if in 1730 there was any such a rule of satisfaction by portions as would have suggested itself to the Lord Chancellor for adoption.

(1) (1860) 9 H. L. C. 1.
(2) Mos. 301.
(3) (1811) 18 Ves. 140.
(4) Ibid. 150.

Then it is to be borne in mind that the Statute of Distributions does not affect the intention of the testator. It simply deals with the distribution by law of that which is left undisposed of, and it adopted the custom of London and the custom of the province of York. It is, therefore, simply a question of trusteeship. It is not an adoption of part of the Statute of Distributions and omitting the rest. We simply follow the decision of a Lord Chancellor who found it fit, proper and just, nearly 200 years ago, to determine, as he did, what was to be done with the undisposed-of residue in a case to which the statute did not apply.

On the Act of 1830 I agree with both my learned brothers. I do not think it has any application whatever, and I should be only wasting time if I attempted to expound more lucidly what was said by Lord Cairns and Lord Hatherley in *Williams* v. *Arkle*. (1) As to the present case, it appears to me, when you come to look at the facts, it is not arguable. There is no question of an executor, as such, asking to retain any fund which the law vested in him. The testator died in 1892, and thereupon the executors assented to this particular bequest of 1,500*l*. It vested in them as trustees, and they thereupon ceased to be executors under the well-known rule. Moreover, a new trustee has been appointed, and it is impossible to regard the statute as having any direct application to such a case: it is entirely a question of trusteeship.

I agree that the appeal must be dismissed.

Solicitors: *F. W. Henry; Ford, Lloyd, Bartlett & Co.*

(1) L. R. 7 H. L. 606.

W. C. D.

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Oct. 22, 23, 24, 25; Nov. 7.

NORMANDY *v.* IND, COOPE & CO., LIMITED.

[1907 N. 38.]

Company—Shareholders—General Meeting—New Regulations—Special Resolution—Notice—Sufficiency—"General Nature" of Business—Non-disclosure—Director's Pension—Agreement—Incidental to Ordinary Business—Ultra vires—Action by Shareholders—Right to sue.

The notice of an extraordinary general meeting of a limited company stated the purpose of the meeting to be to consider and, if thought fit, approve the draft new regulations to be submitted to the meeting, and to pass a resolution approving and adopting the same. It also stated that copies of the proposed new regulations might be seen at the offices of the company, or would be forwarded to shareholders on application. The new regulations contained an article enabling the board to grant a retiring pension to any managing director, and confirming an agreement of January 17, 1902, by which the directors, acting on behalf of the company, agreed to pay to one of the retiring managing directors, for consideration, an annual sum of 1000*l.* for ten years, and 500*l.* a year thereafter for the remainder of his life. There were also other new articles (inter alia)—(1.) enabling the board to increase the remuneration of the directors from 3000*l.* to 4500*l.* per annum, and allowing them travelling, hotel, and other expenses; (2.) providing for the appointment of three directors for life; (3.) relieving directors from liability for loss; and (4.) enabling the directors to borrow a further sum of 150,000*l.*

The resolution adopting the new regulations was passed at the meeting and confirmed at a second extraordinary general meeting.

In an action by the shareholders against the company and the directors to test the validity of the resolutions:—

Held, that the notice of the general meeting, by reason of its omission to refer to the specified matters which were all of importance to the shareholders, did not sufficiently state the "general nature" of the business, as required by the articles of association, and that the resolutions were therefore not duly passed.

What is to be deemed sufficient notice of the general nature of the business must be determined from the particular circumstances of each case by itself

Held, also, that the agreement of January 17, 1902, although within the powers of the company in general meeting, was ultra vires the directors without the sanction of such a meeting, as it purported to grant additional remuneration to a director, which, according to the articles,

could only be effected by a resolution of the company in general meeting.

But *held*, that the shareholders were not entitled to maintain the action at all, and must appeal to the company in general meeting in respect of the irregularity committed by the directors.

No managing or other director is a "person in the employment of the company."

WITNESS ACTION.

The plaintiffs, Alphonse Louis Normandy and two others, sued on behalf of themselves and all other shareholders in Ind, Coope & Co., Limited (except the defendant directors), and were the holders of certain 6 per cent. preference shares in the company. The defendants were the company and its eight directors, of whom the first was Edward Murray Ind.

On November 13, 1886, the company was incorporated for the purpose (inter alia) of acquiring the business and assets of Messrs. Ind, Coope & Co., of Romford and Burton-on-Trent, with a nominal capital of 1,500,000*l.*, divided into 10,000 ordinary shares of 100*l.* each and 5000 6 per cent. cumulative preference shares of 100*l.* each. The nominal capital was subsequently increased. No dividend had been declared on the 6 per cent. cumulative preference shares since January 5, 1905.

By the memorandum of association of the company (clause 3) the objects for which it was established were (inter alia) :—

(*a*) To acquire and carry on the business and goodwill of Messrs. Ind, Coope & Co."

(*g*) "To provide for the welfare of persons in the employment of the company, or formerly in their employment, and the widows and children of such persons, and others dependent upon them, by granting money or pensions, making payments for or towards insurance on the lives of such persons, providing schools, reading rooms, places of recreation, or otherwise, as the company shall think fit. . . . ."

(*h*) "To remunerate the servants of the company, and others, out of or in proportion to the returns or profits of the company, or otherwise as the company may think fit."

(*k*) "To carry out the above objects, or any of them, ... and generally to do all such acts and things as are incidental to the attainment of all or any of the above objects."

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The articles of association bearing upon the questions raised in the action were as follows :—

Article 52 : "Ten days' notice at least, specifying the place, the day, and the hour of meeting, and, in case of special business, the general nature of such business, shall be given in manner hereinafter mentioned to the members. . . . ."

Article 74 : "The business of the company shall be managed by the directors, who may . . . . exercise all such powers of the company as are not by the statutes, or by these articles, required to be exercised by the company in general meeting. . . . ."

Article 75 : "More particularly, and without limiting or controlling the effect of the last preceding article, or the exercise by the directors of any general or specific powers which may be exercisable by the directors as incident to their office in virtue of the company's regulations, or by statute or otherwise, it shall be lawful for the directors, in their absolute discretion, and without any responsibility for any exercise of such discretion, to exercise on behalf of the company and in the name of the company or otherwise" certain specific powers therein set out.

Article 77 : "In the year 1893, and in every subsequent year, the directors shall be entitled out of the funds of the company to take as their remuneration the sum of 3000*l*., which may be drawn and divided by equal quarterly payments. The company may from time to time by resolution in general meeting grant to the directors any additional remuneration. . . . ."

In 1902 E. M. Ind, who was one of the old partners in the firm of Ind, Coope & Co., established in 1797, was in receipt of a salary of 1500*l*. a year, as one of the three managing directors. In that year a redistribution of business was made, and the managing directors were reduced to two. E. M. Ind agreed to retire upon the terms contained in a deed of agreement come to between him and the directors of the company. By that deed, executed under the seal of the company on January 17, 1902, and made by some of the directors acting for the company, it was agreed (clause 1) that E. M. Ind should, as from November 1, 1901, cease to be a managing director of the Romford and London business of the company, and in consideration for his

past services, and for other good consideration, the company agreed to pay him for a period of ten years from May 1, 1902, provided he should so long live, the annual sum of 1000*l.*, and thereafter for the remainder of his life the annual sum of 500*l.* By clause 3 of this agreement E. M. Ind was to continue to be an ordinary director of the company and to receive the remuneration of such a director in addition to the said annual sums. By clause 4 it was agreed that so long as the company should perform its part of the agreement, E. M. Ind would not, without the consent of the company, engage in or carry on, or be concerned, directly or indirectly, in the carrying on (except as a stock or share holder) of any brewery or brewery company in the United Kingdom; nor would he do anything which might interfere with or prejudice the company's business.

This agreement was never brought before any general meeting of the company.

On March 30, 1906, four new directors (the last four defendants) were appointed pursuant to the recommendation of a committee of investigation appointed by the preference shareholders of the company.

By a circular dated June 21, 1906, notice was given to the shareholders of a general meeting of the company on July 3, 1906, to be held at a stated place and time, for the following purposes (inter alia)—(2.) "To consider and, if thought fit, approve the draft new regulations which will be submitted to the meeting, and in the event of the approval thereof with or without modifications;" (3.) to consider and, if thought fit, pass a resolution to the following effect: "That the regulations contained in the printed document submitted to the meeting, and for the purposes of identification subscribed by the chairman thereof be, and the same are hereby approved, and that such regulations be and they are hereby adopted as the regulations of the company to the exclusion of all the existing regulations thereof." The circular concluded with a statement that "Copies of the proposed regulations above referred to may be seen by any shareholder without fee during the usual business hours at the registered office of the company, the Brewery, Romford, Essex; at the company's London office, 6A, Devonshire Square, E.C.; and at the company's office at

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Burton-on-Trent. A copy of the proposed regulations will be forwarded gratis to any shareholder who wishes to have a copy."

At the meeting on July 3, 1906, the resolutions specified by the notice were passed by the requisite majority. The plaintiffs did not attend this meeting, not being aware that any matters of importance to the financial interest of the shareholders were to be dealt with. By a circular of July 7, 1906, sent to the shareholders notice was given of a second extraordinary general meeting to be held on July 18, 1906, to confirm the resolutions alleged to have been passed at the meeting on July 3, 1906. On July 17, 1906, the plaintiff A. L. Normandy obtained a copy of the proposed new regulations, and then for the first time became aware of the nature and effect of the agreement of January 17, 1902, and of the proposed new regulations. He attended the meeting of July 18, 1906, at which about twelve shareholders were present, and objected that the notice convening the meeting of July 3 did not sufficiently set forth the general nature of the special business to be transacted, and he opposed the confirmatory resolution.

The resolutions passed at the meeting of July 3 were declared by the chairman (E. M. Ind) to be duly confirmed. The new regulations alleged to have been thus adopted contained various articles to which the plaintiffs took exception by their statement of claim, namely:—

Article 113 (15.): "The Board shall have authority, and be deemed always to have had authority, to exercise all the powers given to the company by paragraph (*g*) of clause 3 of the memorandum of association, and, in particular, to grant a retiring pension to any director who has been, is, or shall be employed in the management of the company in the capacity of managing director, provided that, in fixing such pension, no account shall be taken of directors' fees, notwithstanding that such pension be given upon his retiring from the office of director as well as from the post of managing director. Edward Murray Ind having served for twenty-nine years as managing partner and managing director, and having retired in the year 1902, shall be entitled and be deemed to have been entitled, as from the date of his retirement, to a payment during his life at

the rate of 1000*l.* per annum for ten years, and 500*l.* per annum thereafter, and the agreement dated January 17, 1902, granting such payment is hereby confirmed."

Article 86: "In remuneration for their services the directors shall, as from April 1, 1906, be paid at the rate of 4500*l.* per annum, to accrue de die in diem, and to be payable at such time or times as the directors think fit, to be divided among the directors in such proportions and manner as the directors may determine, and in default of such determination equally. In addition to the remuneration above mentioned, the directors shall be repaid such reasonable travelling, hotel, and other expenses, as they may incur in attending meetings of the board or committees of the board, or general meetings, or which they may otherwise incur in or about the business of the company."

Article 83: "The said Edward Murray Ind, Charles William Matthews, and Archibald Weyland Ruggles-Brise shall be directors for life so long as they respectively may be duly qualified and willing to act."

By article 158 no director or other officer of the company was to be liable for the acts, receipts, neglects or defaults of other directors, or for any loss or damage arising from the bankruptcy or insolvency of any person with whom money or securities should be deposited, or for any other loss, damage or misfortune whatever which should happen in the execution of the duties of his office, unless through dishonesty.

Articles 50, 51, and 53, gave the directors power to borrow an additional sum of 150,000*l.* on debentures or otherwise, provided that the total did not exceed 4,000,000*l.*, without the sanction of a general meeting.

The plaintiffs alleged that, owing to the defendant directors and their relatives and friends having a large preponderance in the voting power in the company, the plaintiffs were unable to remedy the grievances of which they complained except by taking action in their own names.

The plaintiffs therefore claimed—(1.) a declaration that the extraordinary general meetings held on July 3 and July 18, 1906, were not duly convened, and that the resolutions for the adoption of new regulations were not duly passed; (2.) an

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injunction to restrain the company and the directors from carrying the said resolutions into effect; (3.) a declaration that the agreement of January 17, 1902, was ultra vires, and not binding on the company, and consequential directions and declarations, including (7.) a declaration that the defendant directors were jointly and severally liable to make good to the funds of the company all sums received by them by way of remuneration, or for travelling, hotel expenses, or otherwise, beyond the amounts to which they were entitled under the regulations of the company.

The defendant E. M. Ind by his defence pleaded that the agreement of January 17, 1902, was within the powers of the directors, and binding upon the company without any confirmation by the shareholders in general meeting. All the directors by their defence also pleaded that the action was not properly constituted, and could only be brought by and in the name of the defendant company. Evidence was given by the first plaintiff and the directors on the various points.

Herbert Reed, K.C., *P. O. Lawrence*, K.C., and *T. E. Haydon*, for the plaintiffs. First, with regard to the notice of the extraordinary general meeting, it was insufficient in various particulars. It should have stated the general nature of the special business to be brought before the meeting so that a shareholder might determine whether he would attend or not: *Tiessen* v. *Henderson*. (1) In that case the resolutions were for the reconstruction of a company, and the pecuniary interest of certain of the directors was not disclosed by the notice of the meeting. Your Lordship there said that the application of the doctrine of *Foss* v. *Harbottle* (2) to joint stock companies involved the proposition that the vote of a majority at a general meeting must be a vote given with the utmost fairness. *Kaye* v. *Croydon Tramways Co.* (3) was followed. On the authority of these and other similar cases it is submitted that the meeting here was not properly convened. There must be fair notice of the real business to be presented to the meeting. It is not enough to

(1) [1899] 1 Ch. 861. (2) (1843) 2 Hare, 461.
(3) [1898] 1 Ch. 358.

say that a copy of the proposed new regulations can be obtained on application. As was suggested by the Court in *Young* v. *South African and Australian Exploration and Development Syndicate* (1), an explanatory circular might have been issued dealing with the points of importance to the shareholders.

The main points arising on the new articles which should have been brought before the shareholders by the notice are—(1.) the pension to be granted to E. M. Ind, and the confirmation of the agreement of January 17, 1902 (article 113, clause 15); (2.) the appointment of three of the old directors for life (article 83); (3.) the increase of the directors' remuneration from 3000*l.* to 4500*l.* (article 86); (4.) the increased borrowing powers given to the company (articles 50, 51, 53); (5.) the indemnity to the directors (article 158).

As to the pension or increased remuneration to E. M. Ind, he is not entitled to it by reason of the power contained in the memorandum of association, clause 3 (*g*), because there is no authority for saying that a managing director is a person in the employment of the company. Nor does it fall within (*h*) or (*k*). Can it come within the suggested general inherent power of the company to make business arrangements with its directors? We submit not, and that it is ultra vires the company in the strict sense. But if it does come within the powers of the company in general meeting, it is ultra vires the directors, acting for the company, to make any such agreement. Directors cannot, unless expressly authorized, remunerate one of themselves. In this particular case it was not within the competence of the directors, nor of the company in general meeting, to vote a payment to one of the directors except out of profits. The 1000*l.* a year is not really a pension, but extra remuneration, and that can only be granted at a general meeting according to the articles. The other matters specified in the statement of claim are also of importance to the shareholders.

Then, lastly, as to the objection taken by the defence to the constitution of the action; it is competent to a shareholder to ask that a resolution such as this shall be declared void, as it alters the contract between himself and the company: Buckley

(1) [1896] 2 Ch. 268.

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on the Companies Acts, 8th ed. pp. 548—9. The plaintiffs are therefore entitled to the order which they ask.

Sir Robert Finlay, K.C., and *W. E. Vernon*, for E. Murray Ind. This defendant does not wish to rely upon the validity of the resolutions passed at the meetings, but stands upon the agreement of January 17, 1902, which was for valuable consideration. It is not made better or worse by the passing of the resolutions. The arrangement with E. M. Ind was one which the company was perfectly competent to make in the ordinary course of carrying on the trade of brewers. The principle is recognized in the cases of *Henderson* v. *Bank of Australasia* (1), *Hutton* v. *West Cork Ry. Co.* (2), and *Simpson* v. *Westminster Palace Hotel Co.* (3)

What the directors did was reasonably incidental to the carrying on of the business under clause 3 (*a*), (*k*) of the memorandum of association. An old servant was got rid of, and a pension awarded in consideration of his past services. It was in the interest of the company to do this, so as to secure the services of good men, who otherwise could not be obtained. It was also within the powers contained in articles 74 and 75 of the old articles of association. Although a managing director of a company is not a "clerk or servant" within the meaning of the Preferential Payments in Bankruptcy Act, 1888, s. 1—*In re Newspaper Proprietary Syndicate, Ld.* (4)—yet E. M. Ind comes within clause 3 (*g*) of the memorandum of association as a "person in the employment of the company." As to the sufficiency of the notice of the meeting, the case of *Young* v. *South African and Australian Exploration and Development Syndicate* (5) is in our favour, as it was held that the notice there was sufficient, it being a notice in general terms that the meeting was called to approve new regulations. There was also a similar statement that members were at liberty to inspect a copy of the proposed regulations. The case of *Kaye* v. *Croydon Tramways Co.* (6) is different, as in that case there were two purposes for which the meeting was called, but only one was disclosed in the notice, and it was

(1) (1888) 40 Ch. D. 170.
(2) (1883) 23 Ch. D. 654.
(3) (1860) 8 H. L. C. 712.
(4) [1900] 2 Ch. 349.
(5) [1896] 2 Ch. 268.
(6) [1898] 1 Ch. 358.

termed by Lindley M.R. a "tricky" notice. With the case of *Tiessen* v. *Henderson* (1) I have no quarrel. The notice in the present case was therefore sufficient; it would have been misleading to specify some points and omit others. Further, the action is wrongly constituted, and should have been brought in the name of the company: *Burland* v. *Earle*. (2) Here there is no fraud, and what was done was in any case not ultra vires the company.

Stewart-Smith, *K.C.*, and *G. D. Pepys*, for the old directors, other than the defendant E. M. Ind. Three questions arise—namely, (1.) whether the deed of covenant of January 17, 1902, is ultra vires the company; (2.) whether the meeting of July 3, 1906, was validly summoned; and (3.) whether the plaintiffs are entitled to maintain an action for relief in respect of the matter complained of, and to any and what extent.

With regard to the first question, the evidence of these directors shews that the arrangement embodied in the deed was the best that could be made, and, that being so, the deed cannot be complained of on the ground that it was improvident or fraudulent; and the only question remaining is whether it was intra vires. The evidence shews that such agreements are not infrequent in the case of big breweries, and in this very brewery there have been previous instances of a pension, and North J. attached importance to evidence of that nature in *Henderson* v. *Bank of Australasia*. (3) The granting of pensions is incidental to the business, and promotes the prospects of the company, and is not ultra vires.

With regard to the second question, as to the sufficiency of the notice of the meeting of July 3, 1906, there is more difficulty. Article 52 says that the notice must state "the general nature" of the special business. In *Young* v. *South African and Australian Exploration and Development Syndicate* (4) your Lordship discussed the question of the contents of such a notice, and said that when the business was of great importance, such as the proposed substitution of new articles of association for Table A, it was desirable to supplement the notice

(1) [1899] 1 Ch. 861.
(2) [1902] A. C. 83, 93.
(3) 40 Ch. D. 170.
(4) [1896] 2 Ch. 268, 276.

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with an explanatory circular. The question is whether the shareholder is entitled to demand an explanatory circular. We submit that in this case he got all the notice to which he was entitled under the statute, and he was told where he could get further information if he wanted it. The notice must state the general nature of the business, and that means that it must state what business is to be done, not how it is to be done, or other details. This notice is not misleading, and is sufficient to cover anything short of fraud or breach of duty on the part of the directors, neither of which is alleged. *Kaye* v. *Croydon Tramways Co.* (1) turned on s. 71 of the Companies Clauses Consolidation Act, 1845, and is not an analogous case.

Then, with regard to the third question, it is submitted that the plaintiffs cannot maintain this action: *Mozley* v. *Alston* (2); *MacDougall* v. *Gardiner* (3); *Burland* v. *Earle* (4), in which case Lord Davey said: "It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so." The plaintiffs have no right to complain of this meeting, even if it has been irregularly summoned; an ordinary resolution at a meeting summoned for the purpose will put right all that has passed. No single shareholder can sue in his own name except in a case of ultra vires or fraud, and in every such case he must also shew that the company's name cannot be used because the parties whose conduct is challenged control the majority of the votes and can prevent the company's name being used. That the plaintiffs cannot do in this case. It cannot be assumed that the proxies given at the previous meetings will be given again. The shareholders, whoever they are, can exercise their free will to vote: *North-West Transportation Co.* v. *Beatty.* (5)

Gore-Browne, K.C., and *P. F. S. Stokes*, for the four new directors. These directors are not responsible for anything which was done since their appointment in March, 1906. The agreement as to E. M. Ind's pension is not ultra vires at

(1) [1898] 1 Ch. 358.
(2) (1847) 1 Ph. 790.
(3) (1875) 1 Ch. D. 13.
(4) [1902] A. C. 83, 93.
(5) (1887) 12 App. Cas. 589.

all, but if it is, it is ultra vires the directors only, and not the company, and the plaintiffs' case fails, as the agreement may be sanctioned at a future general meeting. A single shareholder cannot deprive the company of what is a good bargain, as this agreement was. Consideration was given, and it cannot be weighed to say whether it is adequate or not.

With regard to the notice, it clearly specified "the general nature of the business," which was to pass new regulations. There was no reason to state particulars, and it might have been misleading to do so, unless the whole of the alterations were set forth. That would have occasioned great trouble and expense. If the notice was insufficient here, it must be insufficient in all cases where any alterations are proposed. It was either notice or not notice, whatever the magnitude of the alterations. As to the form of the action, the corporate body is the proper plaintiff: *Gray* v. *Lewis*. (1) The Court will not move unless it is shewn that there is a majority oppressing a minority and acting unfairly.

John Henderson, for the defendant company.

P. O. Lawrence, K.C., in reply. The action is maintainable. Each shareholder has a right to see that his contract with the company is fulfilled and the regulations of the company observed: Companies Act, 1862, s. 16; *Pender* v. *Lushington*. (2) On the question of the pension agreement, it is clear that clause 3 (*g*) of the memorandum does not include directors; they are employers, and not persons employed. This annuity is really additional remuneration, which can only be granted by the company in general meeting by virtue of article 77. Directors obtaining benefits for themselves must inform shareholders of the facts: *Alexander* v. *Automatic Telephone Co.* (3)

KEKEWICH J. The remarks which I am about to make are intended to be restricted to the question whether the meetings of July 3 and July 18, 1906, respectively, were duly convened and held or not; and whether the resolutions which those meetings purported to pass were, as a matter of law, duly passed.

(1) (1873) L. R. 8 Ch. 1035, 1050. (2) (1877) 6 Ch. D. 70.
(3) [1900] 2 Ch. 56.

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I intend to reserve judgment on all other points. The question is one, of course, of considerable importance, and it seems to me to stand alone, and it may be conveniently disposed of without touching on the other questions. The board of directors of this company were minded to have new articles of association, or, as they not improperly call them, new regulations. They were minded to introduce many new provisions, and they thought it was a good opportunity of bringing their articles up to date and amending them in many particulars. They were, of course, aware that that could only be done by means of a resolution of an extraordinary general meeting, convened and held as provided by the statute of 1862, with the majority there specified, and confirmed by a subsequent meeting. They were also, of course, aware that, in order to make those meetings and resolutions good, they were bound to give to each member of the company a notice of the meeting, which would state the general nature of the business to be transacted thereat. They had before them a task of some difficulty, having regard to the new provisions. My duty is to determine whether, as a matter of law, they fulfilled that task. What they did was to give a notice which simply specified this. [His Lordship read the words of the second and third resolutions stated in the notice—the first not affecting the question.]

Now those two resolutions do tell any member of the company reading the notice with reasonable intelligence one thing perfectly plainly, that the regulations governing the company up to the present time are to be set aside in favour of new regulations, and that those regulations are to be found in a printed document which will be submitted to the meeting. Mr. Gore-Browne, in his extremely able argument on this part of the case, pressed on me that this at once disclosed the general nature of the business. It is to pass new regulations in substitution for the existing regulations. It is, indeed, general enough; it does not condescend to particulars at all. The argument is that as long as you give the general character of the business there is no occasion to condescend to particulars. But, according to that argument, the information given below in the notice that copies of the proposed regulations might be seen at the offices of the

company, was unnecessary. The question really resolves itself into this: Does that notice sufficiently specify, or mention, or state the general nature of the business? I am asked to say that in all cases it is sufficient to do what was done here, and further to say that it is impossible to hold it insufficient in any one case without holding it insufficient in all, and per contra, if it is sufficient in one case, it is sufficient in all. That is not my view.

I think it is quite possible that, in many cases, this course which has been pursued, and which has already been sanctioned by authority, would be sufficient—for instance, if you are merely bringing the regulations of the company up to date by consolidating old regulations, incorporating with them special regulations which have been passed from time to time, altering the language, or even the form, so as to make them more conformable to modern practice. With such regulations as that there would be no occasion to state any important passages in new regulations, or to call attention to them in any way. I go further and say that there might be matters of importance to which it would not be necessary to call attention, notwithstanding that they might be regarded as matters affecting the welfare of the company. I think every case must be determined by itself, and that what directors, under circumstances such as these, have to consider is whether, in their particular company, with regard to the circumstances in which they find themselves, this particular form is good or bad. I recognize the great difficulty of specifying the important alterations, but it is not insuperable. I recognize also the disadvantage, and I think it is a serious disadvantage, of attempting to put every shareholder in possession of the new regulations without more. I see no reason, if it can conveniently be done, why copies of the regulations should not be sent with the notice shewing what the alterations are. No doubt that would involve a good deal of time and trouble and expense, but I see no difficulty about it. I do see very great difficulty in merely sending copies of the regulations and leaving shareholders, uninstructed, to pick their way through and find out in what respect the new regulations differ from the old. It is a matter for consideration in every

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particular case. Now, what is this particular case? The company had been in existence for some years. It had started with regulations which, I am told, have been altered several times. They have been obliged to borrow a considerable sum of money, and it was thought necessary to borrow more.

The company was not in a flourishing condition; they had been unable to pay their dividends or their preference shares, and they ought to have considered that anything affecting finance would be required to be put before the members in a very plain way so that their views might be taken upon it. The directors had been remunerated by a sum of 3000*l.* a year, but that, in the opinion of the directors themselves, without any expression of opinion on behalf of the company in general meeting, had been treated as insufficient, and they had been in the habit for some time of taking from the funds of the company moneys amounting to just half as much again as that which the articles allowed them. They had been paying themselves 4500*l.* a year or more, and I understand that expenses had been allowed in addition to directors' fees. This had never been disclosed, and had been passed by the auditors of the company without any remark. But more than that, as regards finance, the directors had made an arrangement with one of their body (the validity of which I shall presently have to determine) to pay him an annuity of 1000*l.* a year in addition to his director's fees. With all these matters before them, I should have thought it incumbent upon the directors to open their hearts to the shareholders, to put before them the whole matter frankly, and take their opinion of what had best be done. Instead of that they simply circulate these new regulations, without any reference at all to any particular matter. I will take only those as important which are mentioned in the statement of claim. I do not know that any of the others are of sufficient importance. But, in my view, when once you begin with such alterations as these regulations contain, the best policy is to state it all, and to leave the shareholders to consider exactly to what they are binding themselves.

Now I will take them in the order in which they come in the statement of claim. The first is this matter of Mr. Edward

Murray Ind's payment of 1000*l.* a year. The purport of this article 113 (15.) was to enable the directors to make a payment of 1000*l.* a year to Mr. Edward Murray Ind under the agreement of January 17, 1902. I am not dealing now with the question whether it was competent to the company, or the directors on its behalf, to make such an agreement. But, by taking the precaution of asking the company in general terms to confirm it, they indicated their view, and probably a view wisely taken, that it was important to them and to Mr. Edward Murray Ind, and therefore also to all the members of the company, that this agreement should be confirmed, and that the payments which had been made should not continue to be made without the authority of the company in general meeting. Taking that view, which I must treat them as having taken, it seems very extraordinary, to my mind, that they thought it a matter which could fall within the alterations of regulations, so that the members summoned to the meeting should consider that they had sufficient notice of the general nature of the business.

Now, take the next regulation, which is equally striking. I have said that the directors were allowed 3000*l.* a year between them, and that they had up to that time appropriated 4500*l.* a year without giving information to the members at all. They were proposing, not to condone that in the past, but to provide that it should be so in the future. It is quite possible that 4500*l.* was required in order to provide proper remuneration for the gentlemen who were managing the business of this large company; and indeed, as has been stated in evidence, it was impossible to get gentlemen to undertake the duties without higher pay than could be given out of the sum of 3000*l.* But surely that is a matter of important finance, and even in this very large company, with very large capital and very large indebtedness, it must be a matter of great importance to the members, and certainly to those members who were not receiving dividends, to know whether 3000*l.* or 4500*l.* a year is to be spent in managing their business. Again, it strikes me as extraordinary that any gentleman should have thought that an intimation that regulations would be altered and new regulations substituted could cover such a provision as that as being within

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the general nature of the business to be presented to the meeting.

The next regulation, which is that three gentlemen should be appointed directors for life as long as they shall be duly qualified and willing to act, is to my mind an extremely important one. It is usual in articles of association to provide who the first directors shall be; it is usual to provide for the retirement of the directors by rotation or otherwise, and to provide for the election, and sometimes the re-election, of directors in lieu of those who have retired. If, as often happens, a bargain is made with some gentlemen to undertake the duties for a certain time, that is usually inserted in the articles of association. It is a matter upon which the shareholders are entitled to have information, and one of great importance to them. It strikes me that the shareholders in this company were bound to be interested in the question whether three men, however necessary to the existence of the company, should be made directors for life or not. It is a matter, I think, to which attention ought to be drawn. As regards the indemnity clause, there is not so much in it, but light has been thrown upon it by the evidence, which shews that up to a certain time it was not the practice of the directors to charge for their expenses incurred on behalf of the company. They considered, as I believe directors generally do, that any incidental expenses are covered by their fees; but Burton is some distance from London, the expense of going to and fro may be considerable, and a habit, it seems, has grown up of charging all their expenses to the company. I do not say that is wrong or that, standing alone, it would have been any blot on the notice if attention had not been called to it, and I doubt much whether, irrespective of that question, the new article of indemnity really adds anything to the provision which the law makes in favour of gentlemen undertaking and fulfilling duties of a fiduciary position. But it is not to be passed over in silence. It did alter the relations of the directors to the members of the company, and I think that that is a matter to which attention might very well be called. The remaining provision is, to my mind, one of very great importance. It was proposed to add 150,000*l.* to the amount which might be borrowed, which would

increase the borrowing limit to 4,000,000*l*. It is within the knowledge of all who know anything about these matters that the borrowing limit is always specified in the articles of association, and that the limit cannot be altered without a special meeting. The quantum of a debenture stock, or debentures which take precedence of their dividends, must be a matter of the greatest importance to the shareholders, and, although the money may be profitably employed and for their benefit, still it is of the highest importance to the shareholders to know on what stocks and on what indebtedness interest is to be paid before they can come in for any dividends. That can be easily mentioned. Here it is put in as a new article standing alone, without the slightest indication that it is an amendment of any preceding article. The shareholders were left, if they saw it at all, to conclude whether there was to be an increase or not. But, to my mind, that is not the question, whether they would know when they saw it; the question is whether they ought to have an opportunity of knowing whether there was something to see. To my mind this notice tells them nothing, except that there were to be new regulations substituted for the old regulations, and there is no indication that the new regulations differ in important matters, nearly affecting the shareholders, from the old regulations. When you find such alterations as I have mentioned, and made under such circumstances, it seems to me impossible to hold—and I confess to a strong opinion upon it—that the "general nature" of the business is stated in this notice within any reasonable meaning of those words. How can a man, reading that notice, decide for himself whether he should do any more? The ordinary shareholder no doubt, as long as he holds his shares, has either such confidence in the executive that he leaves them alone or, having lost all confidence, he dismisses the matter from his thoughts. Now, in a going concern like this, he has confidence in the executive and leaves them alone, but he is entitled to know whether there is anything to shake that confidence, or anything which concerns, at any rate, his pocket. He is entitled, at any rate, to be told that large alterations are intended. I decline to accept the test that in all cases a general intimation is enough, and that if I say the general intimation was not enough here, therefore

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it cannot be enough in any case. Every case must be looked at with regard to its particular circumstances, and those directors will be best advised who take the shareholders into their confidence and tell them that they propose on a certain day to confer on the directors larger powers, to give them larger remuneration, and otherwise to affect the position of the members in important particulars which can be easily specified. I do not think the notice in this case complied with the duty to communicate the general nature of the business; I do not think it is such a notice as would convey to the ordinary investor what he is entitled to have conveyed to him, so that he may know whether he shall attend the meeting, or take other steps. I merely express an opinion on that point of law, and on the other questions I reserve judgment.

Cur. adv. vult.

Nov. 7. KEKEWICH J. delivered the following written judgment:—At the close of the argument I held that the extraordinary general meetings of July 3 and July 18, 1906, were not duly convened, and that, therefore, what purported to be resolutions of the company, passed and confirmed at those meetings, were not really resolutions of the company at all. It follows that, in giving effect to those resolutions, the directors have been and are acting without authority. That was the only question then decided.

It now becomes necessary to consider the position of the directors as regards the agreement of January 17, 1902, irrespective of the resolutions. The directors do not rely on the resolutions as authorizing the agreement embodied in this document, but say that it is good of itself, and no other question can usefully be considered until it has been determined whether this contention is sound or not. It is urged on behalf of the plaintiffs that the agreement is ultra vires the company in the strict sense of that term, that is, that the company could not by a special resolution sanction it. For this view I am unable to see any tenable ground. Apart from any prohibition in the memorandum of association, of which there is no trace, it must be competent to the company to make a bargain with one of the directors, either for a reward to him for services rendered in the past, or

for remuneration to him for services to be rendered in the future, to do this with or without consideration, and if consideration enters into the bargain to accept any deemed adequate. Even if apparently extravagant, the pension or remuneration cannot be open to criticism, it being entirely a matter for the company to decide what is right to be done. On this point, without more, I hold the plaintiffs to be in the wrong. It by no means follows that the directors were competent to make the agreement on behalf of the company without the authority of a general meeting. The defendants rely, first, on the provisions of the memorandum of association, and, secondly, on the 74th article. These must be separately considered, and the argument rested on the memorandum of association also falls under two heads—first, it is said that such an agreement as we are considering is reasonably incidental to carrying on the business, to carry on which is the main object of the company, and that the executive, that is the directors, carrying on the business, must be at liberty to do everything which is reasonably incidental thereto; secondly, it is said that this agreement falls within the enumeration of objects—clause 3 (*g*) of the memorandum of association. And in aid of either position, it is urged that, in addition to the powers necessarily vested in the executive as carrying on the business of the company, the directors are, by article 74, expressly authorized to exercise all the powers of the company, which, according to my opinion above stated, cover that of making such an agreement as that in question, unless it be expressly excluded. It is impossible to weigh these arguments, or to arrive at any conclusion on the points raised by them, without carefully considering the nature of the agreement of January 17, 1902. Edward Murray Ind had been not merely a director of the company, but one of the managing directors, and in that character had been in receipt of a salary in excess of his fees as a director. It was found convenient to redistribute the management, and to reduce the number of managing directors. It was competent to the company, and to the directors exercising the powers of the company, to say that Edward Murray Ind should no longer be managing director, and he could not have insisted upon any terms in consideration of his retirement. It was, however,

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agreed between him and his co-directors that on his retirement he should receive for the period of ten years, from May 1, 1902, an annuity of 1000*l*., and from the expiration of that period for the remainder of his life an annuity of 500*l*. It was further agreed that he should remain an ordinary director of the company, and should be entitled to receive the remuneration of such a director in addition to the said annual sums. The agreement further provides, clause 4, that so long as the company shall duly and punctually perform its part, Edward Murray Ind will not, without the consent of the company, engage in or carry on, or be concerned directly or indirectly in the carrying on (except as a stock or share holder) of any brewery or brewery company carrying on business in the United Kingdom, nor will do anything which may interfere with or prejudice the company's business. Much has been made of this provision. Evidence has been given that it would have been a disaster to the company for Edward Murray Ind to do any such things as by this agreement he binds himself not to do, and it is urged that it is not competent to the Court to weigh the consideration, and to say whether it is adequate or not to the benefits conferred by the agreement. I take leave to doubt whether there was any real consideration at all, and whether this clause was not inserted merely for the purpose of giving a colourable value to the agreement, but I agree that, treated as consideration, it cannot be weighed, and I propose to ascertain the meaning and effect of the agreement on that footing. Is this provision for the payment of an annuity to Edward Murray Ind within the memorandum of association, clause 3 (*g*)? In my opinion no managing or other director falls within the phrase "persons in the employment of the company." It is a point of construction not admitting of exposition, and I will only add that the whole frame of the paragraph bears against any construction other than that which I have put upon it. If, however, the annuity may properly be termed a pension, that is, a payment in recognition of past services, it might fairly be upheld, apart from any of the provisions of the memorandum of association to which I have referred. I entertain no doubt that it is within the powers of the executive of a trading company, unless expressly

prohibited, to grant a pension to a retiring officer or servant, and to do that with or without any reasonable terms which may be bargained for or imposed. But, in my opinion, the annuity in question is no pension. It might, of course, have become one in this sense, that Edward Murray Ind might, at a future time, have retired from the board, and the annuity would nevertheless have continued; but that is not what was contemplated or intended. It was intended to give him something in addition to his director's fees, that is, remuneration beyond that which he would receive as a director. To do this would not necessarily be within the competence of the board, and one must inquire what their powers in this connection were. Their only power is contained in the 74th article, which placed a restriction on their general authority, intentionally left unnoticed when reference to that article was made above.

The 74th article says that the directors may exercise all such powers of the company as are not by the statutes or by the articles required to be exercised by the company in general meeting. If the remuneration of a director does not come within this restriction, then such remuneration may be from time to time fixed and altered by the directors on behalf of the company. But it seems to me that the restriction is directly applicable. The 77th article provides that the directors shall be entitled, out of the funds of the company, to take every year, as their remuneration, the sum of 3000*l.*, and it further provides that the company may from time to time, by resolution in general meeting, grant to the directors an additional remuneration. The plain meaning of this is that the directors' remuneration shall not be increased beyond 3000*l.* without a resolution of the company in general meeting, and so the grant of additional remuneration by the directors is by the articles required to be exercised by the company in general meeting, within the meaning of that phrase in article 74. The result is that the directors were well advised to insert in the proposed new regulations a confirmation of the agreement of January 17, 1902, as well as a provision increasing the general remuneration from 3000*l.* to 4500*l.*, and that, so far as they have been making any payment to Edward Murray Ind under the agreement, or drawing

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additional remuneration for him and other directors, they have been acting without authority, and the plaintiffs have succeeded in establishing two points on which they insisted, and which have given rise in great part to this litigation.

Omitting all notice of paragraph 7 of the claim, which was barely discussed, and on which I could form no opinion without knowing more facts as well as having further argument, the rest of the claim deals with consequential relief, and that relief would follow in the form asked, or in some modified form, almost as a matter of course, but for the question necessarily reserved to the last, whether the plaintiffs are entitled to maintain the action at all. It has necessarily been reserved to the last, because it was impossible to say whether the plaintiffs could maintain the action until the legality of the meetings had been decided, and it had also been determined what were the powers of the directors as regards the particular matters to which the action relates. Nevertheless, this question goes to the root of the action, and if it be decided adversely to the plaintiffs their case fails altogether.

The cases which deal with the competence of one or more shareholders in a company to make, on behalf of the entire body, a claim affecting that entire body are numerous and run back into long series of years, and it is instructive to observe that, though they all profess to proceed on the same general principle, even when exceptions to the application of that principle are recognized, the language in which it is expressed varies so much that it is by no means easy to reconcile the whole of any one judgment with every other, and, on the other hand, it is easy to pick out passages which apparently narrow or extend the principle somewhat largely. And what I have said about decided cases is equally true of text-books. I have determined not to attempt another statement of the principle which might serve to obscure, and could not elucidate, the pronouncements of others, and I have come to that determination mainly because the whole subject has been exhaustively treated in a work of high authority which cites every case which has ever been decided. I do not profess myself to have consulted more than a small proportion of these cases, but I have

consulted many of them, including several not cited by counsel. The last edition, that is, the 6th edition of Lord Lindley's treatise on the Law of Companies, does not emanate from himself, but that portion to which I am referring is the work of that eminent jurist, and has the stamp of his authority, being only supplemented by the present editor in details not affecting the general statement. That general statement is to be found in vol. i. pp. 769 to 782, and I am satisfied that I shall best discharge my duty in merely referring to that statement as containing an exhaustive and complete exposition of the law. Perhaps, however, I ought to notice one case of importance which was largely referred to in argument, and was decided before this last edition, but after the treatise had ceased to be issued with Lord Lindley's authority. I refer to *Burland* v. *Earle* (1), the judgment in which, delivered by Lord Davey, contains one of the expositions of the law on which I made the remark that they vary in language though intended to enunciate the same principle. I am not satisfied that the defendants' counsel did not endeavour to press the meaning of that language beyond what it will reasonably bear, but it is sufficient for my purpose to quote the statement in that judgment that in any action brought by a shareholder, on behalf of himself and all the others, the plaintiff cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. It is merely repeating in concise and forcible language what has been stated again and again in other judgments, and is expounded at length in the treatise to which I have referred. Really it is but *Foss* v. *Harbottle* (2) condensed.

Accepting this doctrine, it seems that in deciding that the agreement embodied in the document of January 17, 1902, is within the powers of the company, I have cut the ground from under the plaintiffs' feet. True it is that there is no agreement to pay Edward Murray Ind an annuity; that the directors' remuneration remains as fixed by the articles of association; that the borrowing powers also remain as they were before the irregular meeting of July 3, 1906, and that no directors have

(1) [1902] A. C. 83, 93. (2) 2 Hare, 461.

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been appointed for life; and, further, that so far as the board have purported to act, or are acting, on the faith of the agreement of January 17, 1902, and the so-called resolutions, they have acted, and are continuing to act, without authority, and are responsible to the company for moneys improperly expended and other acts improperly done. But the company may condone the past, confirm what has been done, and say that what has hitherto been irregular shall in the future be part of the regulations of the company. How, then, can the plaintiffs maintain an action in respect of any of these things? The answer given is that there is a contract that the regulations of the company shall be faithfully observed, and that not merely all the shareholders, but any of them, are entitled to insist on the fulfilment of this contract. That is so, but the argument omits consideration of the underlying contract that the regulations may from time to time be altered by the company in the prescribed manner, and that the plaintiffs and all other shareholders will be bound by regulations thus altered. It is one entire contract, and the plaintiffs cannot insist upon one part of it without also submitting to the other. They must appeal to the company in general meeting, and must await and abide by the verdict of that meeting. I wish to safeguard myself on one point. If the directors of a company, purporting to act on the authority of resolutions irregularly passed, were threatening to part with the property of the company in such manner as fairly to justify the charge of irreparable injury, I am not satisfied that the Court would not interfere by injunction to prevent that injury, notwithstanding the possibility, or even probability, that the company would, in general meeting, subsequently uphold the directors' conduct.

A few words must be said on another point raised by the pleadings, and to which some evidence and argument was directed. It is said that this case falls within the class of which *Menier* v. *Hooper's Telegraph Works* (1) is a fair example, where the Court, notwithstanding *Foss* v. *Harbottle* (2) and the other cases, has interfered to prevent a majority from securing benefits to themselves by means of their preponderance of

(1) (1874) L. R. 9 Ch. 350. (2) 2 Hare, 461.

voting power. It would be sufficient to say that the Court has never done this except in a case of fraud, and there is no question of fraud here; but it is well to add this: Although, no doubt, the directors held proxies for the meetings of July 3 and 18, 1906, enough to carry their propositions, and though it is highly probable that at any other meeting dealing with a like subject, or any other subject affecting the company, the directors will again hold proxies enough to countervail any opposition, yet it is impossible to predict that, when the shareholders have had an opportunity of considering the objections of the plaintiffs and others to the new regulations, they will not revolt and vote against the directors. It is because they may do this, while, on the other hand, they may for reasons satisfactory to themselves, which no one has a right to examine, support the directors and pass the new regulations, that it is dangerous and wrong to interfere with their liberty of action. The Court has never departed from the principle on which I am deciding this case, because of the preponderance of votes, unless convinced that such preponderance would be used for an unlawful purpose. There is nothing to justify such a conviction here.

I have not hesitated to say that, in my opinion, the directors have, in more matters than one, acted irregularly; but equally I must not hesitate to say that the plaintiffs cannot seek redress for such irregularity in a Court of law. The tribunal to which they must appeal is a general meeting of the company.

Judgment will be entered for the defendants; but, having regard to all the circumstances of the case, without costs.

Solicitors: *Redpath, Marshall & Holdsworth; Ashurst, Morris, Crisp & Co.; Nash, Field & Co., for Reynolds & James, Birmingham; Thomas William Hargraves; Dawes & Sons.*

G. M.

JOYCE J.
1907
Oct. 17.

In re DE MOLEYNS' AND HARRIS'S CONTRACT.

[1907 D. 948.]

Settled Land—Sale by Trustees—Power of Sale—Consent of Tenant for Life—Lunatic not so found—Quasi Committee—Consent "necessary in the character of trustee," or "as a check upon the undue exercise of the power"—Settled Land Act, 1882 (45 & 46 *Vict.* c. 38), *s.* 53; *s.* 56, *sub-s.* 2—*Lunacy Act*, 1890 (53 & 54 *Vict.* c. 5), *ss.* 116, 120, 128.

The consent of a tenant for life, who is a lunatic not so found, to the exercise by the trustees of settled land of a power of sale contained in the settlement cannot be given on his behalf by a quasi committee appointed under s. 116 of the Lunacy Act, 1890, such consent being neither "necessary in the character of a trustee," nor "as a check upon the undue exercise of the power," within s. 128 of the Act.

In re Baggs, [1894] 2 Ch. 416, n., followed.

Adjourned Summons.

This was a summons under the Vendor and Purchaser Act, 1874, asking for a declaration that a good title had been shewn to the property forming the subject of a contract of sale made between the applicants as vendors and the respondent as purchaser.

The vendors were selling as trustees, under a power of sale contained in the will of their testator, a part of the estates settled thereby on a tenant for life, with remainders over.

The tenant for life under the will was a person of unsound mind not so found by inquisition. By an order in lunacy dated March 18, 1904, and made under s. 116 of the Lunacy Act, 1890, the daughter of the tenant for life was appointed to exercise as regards the estate of the tenant for life all the powers of a committee of the estate as in the case of a person of unsound mind so found by inquisition.

By a further order dated February 21, 1906, the appointment of the quasi committee was continued, and she was authorized to receive the income of the estate and to carry out such of the directions given by orders in the lunacy as had not been carried out or exhausted.

Upon investigation of the title the purchaser took the objection that it was necessary for the vendors, under s. 56, sub-s. 2, of the Settled Land Act, 1882, to obtain the consent of the tenant for life to the exercise by the trustees of the power of sale, and that, inasmuch as the tenant for life was a lunatic not so found, there was no one who could give such consent, and consequently the vendors could not make a good title to the property.

The vendors contended that the person appointed under s. 116 of the Lunacy Act, 1890, to manage the affairs of the tenant for life was competent to consent to the sale, and on their application a further order was made in the lunacy dated May 15, 1907, whereby the quasi committee was authorized by the Master in the name and on behalf of the lunatic to consent to the sale by the trustees of the property in question by being a party to the conveyance and testifying her consent thereby.

The purchaser still insisting upon his objection, this summons was taken out by the vendors to have it determined whether a good title to the property had been shewn.

Martelli, for the applicants. It has no doubt been decided in *In re Baggs* (1) that a person having the powers of a committee appointed under s. 116 of the Lunacy Act cannot exercise the power of sale under the Settled Land Act, but the question remains whether such a person can give the consent required by s. 56 of the Act to the exercise of the power of sale conferred by the will upon the trustees.

Sect. 62 of the Act is confined to the case of a lunatic so found by inquisition, and therefore does not apply; but it is submitted that the case comes within s. 128 of the Lunacy Act, 1890, inasmuch as the consent of the tenant for life is necessary "in the character of trustee or guardian," or "as a check upon the undue exercise of the power." (2)

(1) [1894] 2 Ch. 416, n.

(2) The Lunacy Act, 1890, s. 128, provides that, "Where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the judge to be expedient that the power should be exercised or the consent given, the committee of the estate, in the name and on behalf of the lunatic, under an order

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It was decided in *In re Nevill* (1) that the committee of a lunatic tenant for life could consent to the exercise by the trustees of a power of advancement, and in *In re Garrod* (2) that the committee might be authorized to consent on behalf of a lunatic tenant for life to the exercise of a power of appointing new trustees. Both those cases went upon the ground that the consent was necessary "in the character of trustee," or "as a check upon the undue exercise of the power." They were decided upon s. 137 of the Lunacy Regulation Act, 1853, to which s. 128 of the Lunacy Act, 1890, is the corresponding section. In *In re A.* (3) it was held, under s. 128, that a quasi committee could concur on behalf of the lunatic in exercising a joint power of appointment as being a power vested in the lunatic "in the character of trustee"; and in *In re X.* (4) it was held that, under ss. 120 and 128 of the Lunacy Act, 1890, the Court had power to authorize the quasi committee of a lunatic tenant for life to exercise a power of sale vested in him by the settlement.

It is difficult to reconcile *In re Baggs* (5) with either *In re X.* (4) or *In re Salt* (6), where it was held that the quasi committee might by leave of a judge exercise the power of leasing vested in the lunatic as tenant for life under the Settled Land Act. All the authorities on the subject were considered by the full Court of Appeal in *In re S. S. B.* (7), where it was decided that a quasi committee could not be authorized to exercise a power vested in the lunatic tenant for life by the Lands Clauses Consolidation Act, 1845. There is nothing in the judgments of the Court in *In re S. S. B.* (7) which throws any doubt upon any case except *In re X.* (4) I submit that this case is covered by *In re A.* (3), which was not dealt with in *In re S. S. B.* (7)

J. G. Wood, for the respondent. In order to succeed in this case the vendors must establish that the consent of the tenant

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of the judge, made upon the application of any person interested, may exercise the power or give the consent in such manner as the order directs."

(1) (1885) 31 Ch. D. 161.

(2) (1885) 31 Ch. D. 164.
(3) [1904] 2 Ch. 328.
(4) [1894] 2 Ch. 415.
(5) [1894] 2 Ch. 416, n.
(6) [1896] 1 Ch. 117.
(7) [1906] 1 Ch. 712.

for life is "necessary in the character of trustee," or "as a check upon the undue exercise of the power." Having regard to *In re Baggs* (1), it cannot now be successfully contended that the power of sale conferred upon the tenant for life by the Settled Land Act is vested in him "in the character of trustee or guardian." Nor can it be said that the consent of the lunatic in this case is "necessary as a check upon the undue exercise of the power," because the tenant for life is master of the property, and can altogether refuse to sell. He has an absolute right of veto.

It once having been established that the quasi committee cannot be authorized to exercise, on behalf of the tenant for life, the power of sale under the Settled Land Act, it would be extraordinary if he could be authorized to exercise the consent in this case. That would be authorizing him to put an end to the overriding power of the tenant for life in relation to the settlement.

In *In re A.* (2) Vaughan Williams L.J. expressly says that there is no distinction between the exercise of a power and the giving of a consent to such an exercise.

Martelli, in reply.

Joyce J. This is a vendor and purchaser summons, in which the applicants are the vendors and the respondent is the purchaser. The applicants are trustees having under the will of their testator a power of sale which they have affected to exercise by selling to the respondent. There being a tenant for life under the will, it is required by s. 56, sub-s. 2, of the Settled Land Act, 1882, that the trustees should not exercise their power of sale without the consent of the tenant for life. The tenant for life is, however, a lunatic not so found, and in respect of her estate an order has been made under s. 116 of the Lunacy Act, 1890, appointing a person to exercise all the powers of a committee. It is said that this quasi committee can, on behalf of the tenant for life, give the consent necessary to the sale by virtue of the provisions of s. 128 of the Lunacy Act of 1890, it being urged, in the first place, that it is the case of a consent by the tenant for life to the exercise of

(1) [1894] 2 Ch. 416, n. (2) [1904] 2 Ch. 328, 331.

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a power, such consent being necessary in "the character of trustee." That argument is founded on s. 53 of the Settled Land Act, 1882, which provides that a tenant for life shall, in exercising any power under the Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

Now a similar question has been raised with reference to the power of sale conferred by the Settled Land Act upon a tenant for life. And it has been determined in *In re Baggs* (1) that such a power is not a power vested in the lunatic in the character of a trustee, and, notwithstanding all that has been said about that case, it is impossible for me not to follow it. It is binding on me. If, then, a power of sale under the Settled Land Act is not vested in the tenant for life in the character of a trustee, it is almost impossible to see how his consent to the exercise of a power of sale by the trustees can be said to be "necessary in the character of a trustee." He is not bound to consent at all, though no doubt in selling under a power or consenting to a particular sale, perhaps he is acting in a fiduciary capacity and must have regard to the interests of all parties under the settlement. But not unless and until he does sell or consent do those duties and liabilities fall upon him. Therefore it seems to me the consent is not necessary "in the character of trustee." But is it necessary "as a check upon the undue exercise of the power"? I think not. This is not the case of a power of appointment or advancement, or anything of that sort, which the settlement requires to be exercised by the trustees with the consent of the tenant for life. The Settled Land Act requires the consent of the tenant for life to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in the Act, and I do not think that this is a case in which the consent can properly be said to be necessary "as a check upon the undue exercise of the power."

I think, therefore, that the quasi committee is not entitled

(1) [1894] 2 Ch. 416, n.

under s. 128 of the Lunacy Act to give the consent required on behalf of the lunatic tenant for life. Accordingly I hold that the objection of the purchaser must succeed, and there will be a declaration that the vendors have not shewn a good title according to the contract.

Solicitors: *Lawrance, Webster & Co.; Carthew & Wheeler, for Barry & Harris, Bristol.*

G. A. S.

In re BROADWOOD'S SETTLEMENTS. BROADWOOD *v.* BROADWOOD.

[1907 B. 725.]

Tenant for Life and Remainderman—Settled Mortgage—Settlor taking First Life Interest—Deficient Security—Life Tenant's Death—Subsequent Receipts in respect of past and accruing Income—Apportionment pending Realization—Arrears due at Date of Settlement.

On December 10, 1884, a mortgage of 18,000*l.* on farm A was settled on successive trusts for two life tenants and a remainderman without making any provision for some three years' arrears of interest then owing to one settlor who became first life tenant thereunder. The first life tenant died on July 8, 1893, and the second life tenant on January 22, 1903.

From October 11, 1881, to October 11, 1902, the mortgagor had worked farm A together with farm B under an arrangement by which he was to pay the net incomes to the mortgagees of farm A and farm B respectively to the extent of the interest due to them.

The net incomes were not nearly sufficient to keep down the interest in either case, but owing to errors in the apportionment of working expenses during the joint working the mortgagees of farm B had altogether been paid 1028*l.* in excess of the income properly attributable to their farm.

On August 11, 1905, the trustees recovered the 1028*l.*, representing income earned from October 11, 1881, to October 11, 1902, from the mortgagees of farm B.

From October 11, 1902, to October 11, 1906, the mortgagor continued to work farm A as manager to the trustees.

On October 11, 1906, the trustees let farm A at a rent of 515*l.*, and on November 29, 1906, they received 2368*l.* in respect of the sale of farm stock provided out of and representing income earned from October 11, 1881, to October 11, 1906.

The interest was now heavily in arrear, and the security was greatly depreciated.

SWINFEN EADY J.

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BROADWOOD'S SETTLEMENTS, *In re.*

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Foreclosure proceedings had been commenced, but no order had yet been made:—

Held, that the first life tenant's representative could not as against the other beneficiaries claim any arrears of interest owing at the date of the settlement, but subject to this exception the two sums of 1028*l.* and 2368*l.*, and every sum of accruing rent received up to the time of foreclosure absolute, must be treated as a payment on account of all arrears of interest owing at the date of payment, and must be apportioned between the estates of the two life tenants and the remainderman in proportion to the amounts owing to them for arrears of interest at the date when the particular sum was received.

ORIGINATING SUMMONS.

By a family settlement of August 11, 1876, a mortgage of 18,000*l.* on farm A, and certain other securities previously transferred to the Broadwood trustees, were settled on such trusts as Henry Fowler Broadwood and his eldest son should by deed jointly appoint, and subject thereto upon trust for Henry Fowler Broadwood for life, with remainders over. The mortgage interest was 5 per cent., reducible to 4 per cent. on punctual payment.

By a marriage settlement of December 10, 1884, made on the eldest son's marriage, the 18,000*l.* mortgage and some of the other securities were appointed by Henry Fowler Broadwood and his eldest son upon trust that the Broadwood trustees should hold the same upon trust (subject to an annuity of 1000*l.* to be paid out of the current income of the trust premises for the benefit of the eldest son or his wife or issue during Henry Fowler Broadwood's life) to pay the income to Henry Fowler Broadwood, hereinafter called the first life tenant, for life, and after his death to pay the income to his eldest son, hereinafter called the second life tenant, for life, and after the death of the survivor to hold the trust premises upon trust to raise 10,000*l.* portions for the younger children; and to hold the residue (subject to certain trusts for the wife which failed by her predeceasing her husband) upon trust for the first son of the second life tenant who should attain twenty-one, and if there should be no such son, upon trust for the second life tenant absolutely.

The first life tenant died on July 8, 1893. The second life tenant died on January 22, 1903, having had three children only, namely, a son born March 17, 1889, and two daughters still infants.

In 1881 the mortgagor got into financial difficulties, and the interest fell into arrear.

The Broadwood trustees did not take possession, but it was arranged that from October 11, 1881, the mortgagor should carry on farm A together with farm B, which was mortgaged to certain hospital trustees. The farms were to be carried on as one business, but the balance of the proceeds of each farm was to be paid to its own mortgagees to the extent of the interest due to them.

Payments were made from time to time out of the general receipts after deduction of working expenses, but they were not sufficient to keep down the interest on either mortgage.

The mortgage on farm B was foreclosed on July 31, 1902, and on October 11, 1902, the hospital trustees took possession and the joint arrangement terminated. The mortgagor continued to work farm A as manager on behalf of the Broadwood trustees until October 11, 1906, when the trustees let the farm to Ward as below stated.

On the adjustment of the accounts between the two farms it was discovered that, owing to errors in apportionment of the working expenses during the joint working, the hospital trustees had altogether been paid 1028*l.* in excess of the income properly attributable to the working of farm B. They therefore paid this amount to the Broadwood trustees on August 11, 1905, after an arbitration deciding their liability. The 1028*l.* had partly been applied in payment of costs and expenses, so that only about 445*l.* was left.

On May 25, 1906, the Broadwood trustees obtained an order giving them liberty to take proceedings for foreclosure, and also to let farm A to Ward for ten years at a rent of 515*l.* The evidence on that application shewed that the farm was worth about 9000*l.* The farm was let to Ward as aforesaid on October 11, 1906, and foreclosure proceedings had been commenced, but no order had yet been made.

On November 29, 1906, the Broadwood trustees received a sum of 2368*l.* in respect of money arising from the sale of live and dead stock on farm A, provided out of and representing past income from October 11, 1881, to October 11, 1906.

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The sums received during the first life tenancy (including the life tenancy under the earlier family settlement) were paid to the first life tenant, the 1000*l.* annuity being deducted after the marriage settlement of 1884, and the sums received during the second life tenancy were paid to the second life tenant, but considerable arrears of interest were owing to each life tenant at his death. Roughly speaking, 2500*l.* was due at the date of the marriage settlement, another 4000*l.* at the first life tenant's death, and another 4600*l.* at the second life tenant's death. Since then about 1800*l.* had become due to the remainderman by August 11, 1905, and another 1000*l.* by November 29, 1906. Part of the income received since the second life tenant's death had been applied in maintaining the infant remainderman. The 10,000*l.* for portions had been appropriated out of other securities.

This summons was issued to determine how the sum of 1028*l.*, less costs, and 2368*l.* and the accruing rent ought to be apportioned between the estates of the two life tenants and the remainderman.

Leverson, for a trustee of the marriage settlement.

Eve, K.C., and *H. J. H. Mackay*, for the remainderman. As the first life tenant joined in the marriage settlement of 1884 and settled the mortgage without making any provision for the 2500*l.* arrears of interest then due, he could not have claimed them as against the beneficiaries under that settlement. In other words, he must be taken to have settled a clear mortgage quoad the beneficiaries, though as against the mortgagor his personal remedy on the covenant remained. The 2500*l.* arrears due on December 10, 1884, may therefore be left out of consideration.

Further than this, on the construction of the marriage settlement, the life tenants were only to be paid the income, namely, the income actually accruing. In that case there would be no apportionment in respect of arrears, and the remainderman is entitled to all moneys received since the second life tenant's death, including the 1028*l.* and 2368*l.* If, however, the life tenants were entitled to the full interest, and the 1028*l.*

and 2368*l.* have to be apportioned, there must be an inquiry as to the value of the farm, as the proceedings will merely result in foreclosure, a sale being out of the question. When the value is ascertained the loss on capital will be known, and the 1028*l.* and 2368*l.* can be apportioned in proportion to the respective deficits on income and capital: *In re Atkinson.* (1)

[SWINFEN EADY J. Can that principle be applied before realization of the security?]

The present foreclosure proceedings and the lease amount to a potential realization, and, having regard to the large deficiency on capital, the money ought to be kept in hand until foreclosure absolute. In the present case that is the only way of keeping an even hand between income and capital, for both of which the mortgage was a security. The remainderman is of course entitled to the accruing rent as income.

S. Dickinson, for the first life tenant's representative. The marriage settlement of December 10, 1884, was either subject to the 2500*l.* arrears of interest then due, or it included them as income. In either case the first life tenant was entitled to receive them out of the sums paid to the trustees. He was also entitled to all income that ought to have been produced, and not merely to the income actually produced.

Now the whole of the 1028*l.* was income actually earned during the joint working from October 11, 1881, to October 11, 1902, that is, during the life tenancies, treating the first life tenancy under the two settlements as continuous. The 2368*l.* was income actually earned from October 11, 1881, to October 11, 1906, that is, during the life tenancies and about four years after. The first life tenant's representative is therefore entitled to the entirety of those portions of the 1028*l.* and 2368*l.* attributable to the first life tenancy, with a right to prove for arrears against subsequent income, including (*a*) the portion of the 1028*l.* attributable to the second life tenancy, (*b*) the portion of the 2368*l.* attributable to the second life tenancy and the remainder, and (*c*) the accruing rent.

Micklem, K.C., and *Sargant*, for the second life tenant's representatives. The first life tenant must be treated as having

(1) [1904] 2 Ch. 160.

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abandoned the 2500*l.* arrears as against the beneficiaries under the marriage settlement of December 10, 1884, and all income must be treated as earned since that date. The principle of *In re Atkinson* (1) is Beati possidentes. Each life tenant was entitled to keep all that was earned during his life, with a right to prove for arrears against capital, but with no right of proof against subsequent income.

The 1028*l.* should therefore be treated as earned from December 10, 1884, to October 11, 1902, and divided between the life tenants' representatives in proportion to the durations of the life tenancies between those dates. The 2368*l.* should similarly be treated as earned from December 10, 1884, to October 11, 1906, and divided between the life tenants' representatives and the remainderman in proportion to the durations of the life tenancies and remainder between those dates.

If this contention is wrong the two sums of 1028*l.* and 2368*l* should be apportioned between the respective estates in proportion to the amounts owing to income and capital at the date each payment was received: *In re Atkinson* (1); *Stewart* v. *Kingsale* (2); *In re Alston* (3); *In re Godden* (4); *In re Ancketill.* (5)

[SWINFEN EADY J. That principle is applicable when the security is realized and the capital loss ascertained. But there is no precedent for an inquiry as to prospective loss.]

In that case the apportionment should be in proportion to the amounts owing to income only, the remainderman being entitled to prove for arrears of income, but not for capital. The accruing income, i.e., the 515*l.* rent, should be apportioned in the same way.

SWINFEN EADY J. (after stating the facts). The question is how the 1028*l.* and 2368*l.* past income recently recovered and the accruing rent are now to be dealt with.

In the first place, according to the true construction of the marriage settlement of December 10, 1884, the first life tenant,

(1) [1904] 2 Ch. 160.
(2) [1902] 1 I. R. 496.
(3) [1901] 2 Ch. 584.
(4) [1893] 1 Ch. 292.
(5) (1891) 27 L. R. Ir 331.

having concurred in that settlement and taken the first life interest subject to his son's annuity, was not entitled to set up that any arrears of interest on the 18,000*l.* mortgage thereby settled were owing to him at the date of that settlement or that he was entitled to receive those arrears or any sum in respect of them to the prejudice of the cestuis que trust. Since that date the interest has never been paid in full.

If, therefore, the first life tenant's representative could claim any part of the income as apportionable in respect of arrears owing at the date of the marriage settlement, the effect would be to deprive the cestuis que trust of what in terms was appointed for their benefit, and, whilst conceding that if the mortgage interest subsequent to that settlement had not only been paid in full, but there had been a surplus, the first life tenant would have been entitled to his arrears out of that surplus, he could not claim in competition with the cestuis que trust in derogation of the settlement he executed.

The result is that the first life tenant's representative cannot claim any apportionment in respect of arrears owing at the date of the marriage settlement.

Now the first life tenant lived nearly nine years after the date of that settlement. During that time he was in my opinion entitled, not only to the income in fact received during his life, but, subject to the 1000*l.* annuity, he was entitled to the whole income that ought to have been produced by the 18,000*l.* mortgage. In other words, he was life tenant of the mortgage debt, and entitled to the whole interest properly payable. But, as he only received payments on account, there were considerable arrears accruing between the date of the marriage settlement and his death on July 8, 1893. The second life tenant was in the same position, and large arrears were owing to him at his death on January 22, 1903. Since then the infant remainderman is entitled to the income and capital contingently on attaining twenty-one and arrears of interest are owing to him.

The question is how the two sums of 1028*l.* and 2368*l.* and the accrued and accruing rent are to be dealt with. The mortgage security is admittedly insufficient; but it has not been realized, and although foreclosure proceedings are pending,

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BROADWOOD'S SETTLEMENTS, *In re.*
BROADWOOD *v.* BROADWOOD.

they have not been completed. The property consists of a farm let at 515*l.* a year. Until foreclosure absolute, I am of opinion that the income must be distributed rateably between the persons entitled to the income, and the proper method will be to take the date when each sum is or was received or recovered and apportion that sum in proportion to the amounts owing to the respective estates for arrears of interest at that date. That is to say, each sum received or recovered is to be treated as a payment on account of all arrears claimable by the representatives of the first and second life tenants and the remainderman, and is to be apportioned rateably between them in accordance with the arrears owing to them respectively. It is in this way that the 1028*l.*, or the residue of it, and the 2368*l.* will be applied, and the subsequent rents ought to be applied in the same manner until foreclosure absolute. It is obvious that the amount due to the remainderman will be gradually increased, and the amount due to the life tenant's representatives diminished, by this method of application. That, however, is the proper way to divide the income.

Solicitors: *Atkey, Clarke & Atkey; Young, Jones & Co.; Wade & Lyall.*

G. R. A.

SWINFEN EADY J.

1907

Oct. 25.

In re WAIDANIS.
RIVERS *v.* WAIDANIS.

[1907 W. 767.]

Will—Trustee—"Persons who are the Trustees of the Will of A."—Executors of last surviving Trustee—Last surviving Trustee appointed after A.'s Death—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 30.

W. by her will devised and bequeathed property to the person or persons who should at her death be trustees of her father's will. At her death all the trustees of her father's will and all the trustees appointed in their place were dead. The executors of the last survivor of the trustees so appointed had acted in the trusts of her father's will:—

Held, that these were at her death trustees of her father's will, and were duly appointed trustees of her own.

Ockleston v. *Heap*, (1847) 1 De G. & Sm. 640, *held* to have been overruled by *Hall* v. *May*, (1857) 3 K. & J. 585, and not followed.

Elizabeth Waidanis, deceased, by her will dated June 29, 1903, devised and bequeathed and appointed all the real and personal estate devised or bequeathed by the will of her father, Nesfield Robison, or assured by an indenture of settlement therein mentioned, to the persons or person who should at the time of her decease be the trustees or trustee of the will of the said Nesfield Robison, upon trust thereout to pay her debts, funeral and testamentary expenses and pay the income of the residue to her husband for life, and after his death to the plaintiff for life, with remainders over; and she gave all other her estate to her husband, and appointed Tom Lamonby executor of her will.

The testatrix died on September 1, 1906.

Nesfield Robison, who died on April 18, 1871, had by his will appointed his wife, Joseph Benson Dixon, and Nathaniel Caine his trustees.

Nathaniel Caine had disclaimed.

The other two trustees were both dead, and new trustees had been appointed in their places. Tom Lamonby, who was appointed a trustee on January 14, 1889, survived his co-trustees, and died

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on May 1, 1905, having appointed four of the defendants his executors. These defendants had from the time of the death of Tom Lamonby acted as trustees of Nesfield Robison's will.

The husband of the testatrix E. Waidanis was resident abroad. Administration of her estate, with the will annexed, had been granted to one of the said four defendants as his attorney.

The plaintiff commenced this action on March 12, 1907, asking for a declaration that the four defendants, the executors and trustees of Tom Lamonby's will, were not trustees of the will of E. Waidanis, and that new trustees thereof might be appointed, and for other relief.

Wright Taylor, for the plaintiffs. At the date of the testatrix's death there were no trustees of her father's will. The executors of Tom Lamonby were not trustees thereof, though the legal estate of the property may have been vested in them.

Potts, for the executors of Tom Lamonby. It is settled law that where assigns are named in the deed creating a trust the powers can be executed by testamentary assigns: *Titley* v. *Wolstenholme* (1); *Hall* v. *May*. (2) It was decided in *In re Morton and Hallett* (3) that the heir of a trustee would exercise the powers of a trustee, and in *In re Cunningham and Frayling* (4) that an heir so acting was a trustee. In *In re Ridley* (5) and in *In re Bennett* (6) it was held that the administrator of a deceased trustee could not be compelled to act in the trusts and exercise a right of retainer for the benefit of the cestuis que trust; but the ground of those decisions was that the administrator had not acted in the trusts, and must be taken to have declined them. In this case the executors of Tom Lamonby have accepted and acted in the trusts, and must be taken to be trustees for all purposes.

Wright Taylor, in reply. There is no case where the executor of a trustee nominated after the date of the instrument creating the trust has been held to be a trustee. *Ockleston* v. *Heap* (7) is precisely in point, and the Court appointed new trustees. All

(1) (1844) 7 Beav. 425.
(2) 3 K. & J. 585.
(3) (1880) 15 Ch. D. 143.
(4) [1891] 2 Ch. 567.
(5) [1904] 2 Ch. 774.
(6) [1906] 1 Ch. 216.
(7) 1 De G. & Sm. 640.

the cases cited depend on the word "assigns." But since the Judicature Act a trustee cannot assign a trust estate by his will.

SWINFEN EADY J. I should be sorry to throw any doubt on the proposition that the executors of Tom Lamonby were the trustees of the will of his testator. By the will of Mrs. Waidanis's father his real estate was devised to trustees therein named, their heirs and assigns. Successive trustees were appointed in their places, and the last person to be appointed was Tom Lamonby. He survived his co-trustee and died in 1905, having appointed executors.

The plaintiffs' counsel relied on *Ockleston* v. *Heap* (1); but that decision was founded on a doubt whether *Titley* v. *Wolstenholme* (2) was well decided, a doubt which has since been removed by the decision of *Hall* v. *May*. (3) Sect. 30 of the Conveyancing Act, 1881, after providing that a trust estate shall, on the death of the trustee, vest in his legal personal representatives, provides that "the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers." So the executors of Tom Lamonby, who was the trustee of the father's will, are to be deemed the heirs and assigns of Tom Lamonby. His executors not only proved his will, but accepted the trusts of Nesfield Robison's will, and acted therein for more than twelve months before the testatrix's death. Then the testatrix appointed the person or persons who at her death should be trustees of her father's will. I hold, therefore, that the executors of Tom Lamonby, being at the testatrix's death trustees of her father's will, were duly appointed and are trustees of her will, and I cannot appoint new trustees in their place.

Solicitors: *Nye, Moreton & Clowes, for Nye & Treacher, Brighton; Harrison & Powell.*

(1) 1 De G. & Sm. 640. (2) 7 Beav. 425.
(3) 3 K. & J. 585.

J. R. B.

SWINFEN EADY J.
1907
Oct. 31.

In re SIDNEY.
HINGESTON *v.* SIDNEY.

[1907 S. 2126.]

Charity—Gift—Charitable Uses or Emigration Uses—Uncertainty.

A bequest in trust "for such charitable uses or for such emigration uses or partly for such charitable uses and partly for such emigration uses" as the trustees shall think fit is void for uncertainty, as emigration uses are indefinite, and are not necessarily charitable.

ORIGINATING SUMMONS.

By his will, dated November 13, 1905, a testator gave his residuary estate to certain trustees, who disclaimed, "Upon trust to dispose of the same for such charitable uses or for such emigration uses or partly for such charitable uses and partly for such emigration uses as they shall in there absolute and uncontrolled discretion think fit."

The testator died on August 26, 1906, leaving personal estate only.

This summons was issued to determine (inter alia) whether the above bequest was a valid charitable bequest or was void for uncertainty.

Rolt, for the executors.

Hon. E. C. Macnaghten, K.C., and *de Montmorency*, for the next of kin. This is an alternative gift for charitable uses or emigration uses, and, unless the indefinite emigration uses are necessarily charitable, the gift is void for uncertainty: *Hunter* v. *Attorney-General* (1); *Blair* v. *Duncan* (2); *In re Macduff* (3); *Morice* v. *Bishop of Durham.* (4) These and other authorities are conveniently summarized in the argument in *In re Allen.* (5) Now charity in its legal sense comprises trusts for—(*a*) the relief of poverty; (*b*) the advancement of education; (*c*) the advancement of religion and (*d*) other purposes beneficial to the com-

(1) [1899] A. C. 309, 315, 323, 324.
(2) [1902] A. C. 37.
(3) [1896] 2 Ch. 451, 462, 466.
(4) (1805) 10 Ves. 522.
(5) [1905] 2 Ch. 400, 402.

munity: *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1); *Morice* v. *Bishop of Durham.* (2)

Emigration uses, if charitable, must fall under (*a*) or (*d*), though that alone would not make them charitable: *In re Macduff.* (3) Now, emigration is not confined to the poor, and it would be no breach of trust in this case to subsidize a line of steamships for well-to-do emigrants in order to populate and develop a given district. No doubt a gift for assisting poor deserving persons to emigrate would be charitable: *Barclay* v. *Maskelyne* (4); but this gift is not so limited. If limited to poor persons simply irrespective of their merits, it would authorize the wholesale emigration of wastrels, which would probably lead to international complications. This would make the gift void as against public policy: *Habershon* v. *Vardon.* (5)

Again, emigration is not necessarily beneficial to the community. It is not limited to the Colonies, and to encourage our best artisans and skilled agricultural labourers to emigrate to places outside the British Empire, so far from being beneficial to the community, is really against public policy: *Briggs* v. *Hartley.* (6)

George Lawrence, for the Attorney-General. The gift is valid for three reasons:—First: The emigration uses are evidently intended to assist poor persons to emigrate, e.g., by providing their outfit and passage money. Rich persons may emigrate, but they do not require assistance, nor are they called emigrants.

Secondly: Emigration to any part of the world relieves the home pressure, and is beneficial to the community as a whole. In 1850, when *Briggs* v. *Hartley* (6) was decided, emigration was not favourably regarded. The prerogative writ of ne exeat regno was still in force, and no one was entitled to leave the kingdom without the sovereign's permission: *Barclay* v. *Maskelyne.* (4) This academic view would not be acted on at the present day. The tendency of the Courts is to extend the meaning of "purposes beneficial to the community" as far as possible. For instance, a gift to maintain a library for an

(1) [1891] A. C. 531, 583.
(2) 10 Ves. 522.
(3) [1896] 2 Ch. 451, 462, 466.
(4) (1858) 4 Jur. (N.S.) 1294.
(5) (1851) 4 De G. & Sm. 467.
(6) (1850) 19 L. J. (Ch.) 416.

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SIDNEY, *In re.*
HINGESTON v. SIDNEY.

officers' mess has been held charitable under this head: *In re Good.* (1)

Thirdly: If emigration uses are not necessarily charitable, they are sufficiently definite and ascertainable to enable the Court to apportion the fund between the charitable and non-charitable objects, as in *Attorney-General* v. *Doyley* (2) and *Salusbury* v. *Denton* (3), recognized by Lord Davey in *Hunter* v. *Attorney-General.* (4)

SWINFEN EADY J. In this case the testator gave his residuary estate to certain trustees upon trust to dispose of the same for such charitable uses, or for such emigration uses, or partly for such charitable uses and partly for such emigration uses, as they should in their absolute and uncontrolled discretion think fit.

The question is whether the residuary gift is a valid charitable gift. I am told that the trustees disclaimed, but, of course, that does not affect the question which I have to consider.

Now it will be observed that as a matter of construction no part is necessarily given to either the charitable uses or to the emigration uses. According to the true construction of the will it is open to the trustees to dispose of the whole for charitable uses, or without devoting any part to charitable uses they may dispose of the whole for emigration uses; so that it does not come at all within the class of case in which a part, or a definite part, is necessarily given to charitable uses. But the real question which has to be determined is whether the gift for such emigration uses as the trustees shall in their absolute and uncontrolled discretion think fit is a good charitable gift. In *Hunter* v. *Attorney-General* (4) Lord Halsbury L.C. says: "It is undoubtedly the law that, where a bequest is made for charitable purposes and also for an indefinite purpose not charitable and no apportionment is made by the will, so that the whole might be applied for either purpose, the whole bequest is void, and I do not understand any of the judges of the Court of Appeal to question that doctrine"; and Lord Davey

(1) [1905] 2 Ch. 60.
(2) (1735) 4 Vin. Abr. 485; 7 Ves. 58, n.
(3) (1857) 3 K. & J. 529.
(4) [1899] A. C. 309, 315.

says (1): "Where the description includes purposes which may or may not be charitable (such as 'undertakings of public utility'), and a discretion is vested in the trustees, the whole gift fails for uncertainty."

It has been sought to uphold the gift in the present case, first, upon the ground that quoad emigration uses it means, and must be read as, a gift for the benefit of poor people with a view to assist them to emigrate directly or indirectly; and, secondly, upon the ground that a gift to promote emigration is a good charitable gift because emigration is for the general public utility.

In my opinion neither of those two arguments is well founded. I see no ground for restricting the gift as a matter of construction to assisting poor people to emigrate, either by paying their passages or otherwise assisting them. Emigration is not confined to the poor, nor do I think that emigration is of such general public utility, or for the benefit of the whole community, that a gift to aid it is necessarily a charity. It is quite easy to see from the many instances put during the course of the argument that emigration is not confined to poor people, and there are many modes of application that would come within the phrase "emigration uses" but would not come within the assistance of poor persons; and I certainly am unable to say that emigration from any place to any place is necessarily, or is primarily, for the benefit of the community at large. It will be observed that the emigration is not limited to British Colonies; it is simply for emigration uses—apparently from anywhere to anywhere. In *In re Macduff* (2) a bequest for "some one or more purposes, charitable, philanthropic or ," construed as a bequest for "charitable or philanthropic purposes," was held not to be a good charitable bequest, as there might be philanthropic purposes that were not charitable.

The vice of the gift in the present case is that it is vague, indefinite, and not charitable, and therefore it fails.

Solicitors: *Beachcroft, Thompson & Co.; Saw & Sons; Treasury Solicitor.*

(1) [1899] A. C. 323. (2) [1896] 2 Ch. 451, 462.

G. R. A.

SWINFEN EADY J.

1907

Oct. 29, 30; *Nov.* 14.

In re SPENCER COOPER.

POË *v.* SPENCER COOPER.

[1907 C. 1934.]

Will—Testamentary Expenses—Legacies—Direction to Pay—Mixed Fund—Rateable Payment—Portion attributable to Realty—Estate Duty—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 6, *sub-s.* 2; *s.* 8, *sub-ss.* 3, 4.

A general direction to pay legacies out of a mixed fund of residue charges them rateably on the portions attributable to realty and personalty.

Roberts v. *Walker*, (1830) 1 Russ. & My. 752, and *Allan* v. *Gott*, (1872) L. R. 7 Ch. 439, applied.

So far as the legacies are payable out of the portion attributable to realty they are real estate, and must bear their own estate duty, notwithstanding a direction to pay "testamentary expenses" out of the mixed fund.

Smith v. *Claxton*, (1820) 4 Madd. 484; *In re Sharman*, [1901] 2 Ch. 280; and *Berry* v. *Gaukroger*, [1903] 2 Ch. 116, applied.

In re Trenchard, [1905] 1 Ch. 82, distinguished.

ORIGINATING SUMMONS.

By his will, dated May 25, 1906, a testator, after appointing the plaintiffs executors and trustees, and after bequeathing several pecuniary legacies, devised and bequeathed all his real estate and all the residue of his personal estate "not hereby otherwise disposed of" to his trustees upon trust for sale and conversion, and directed that the trustees should "out of the monies to arise from the sale calling in and conversion of or forming part of my said real and personal estate pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto," and should stand possessed of the said residuary trust moneys in trust for a residuary legatee.

The testator died on October 1, 1906. His clear estate subject to the legacies consisted of 300,000*l.* personalty and 6000*l.* realty. The personalty was more than enough to pay the legacies.

This summons was issued to determine (inter alia) whether any

and what proportion of the pecuniary legacies ought, as between the legacies and the residuary estate, to be charged with estate duty.

Austen-Cartmell, for the executors and trustees.

Ashworth James, for a legatee. This is not a case where legacies are given out of a mixed fund in the first instance. They are direct pecuniary bequests, and are primarily payable out of personalty. The subsequent trust for sale and conversion of the real estate and residuary personal estate is mere machinery. It charges the real estate in aid, but does not alter the primary liability of the personal estate: *In re Bawden*. (1) The residue of the personal estate "not hereby otherwise disposed of" really means the personal estate minus the legacies. The testator cannot have intended to reduce the legacies by subsequently creating a mixed fund for their payment. If this argument is correct, the personal estate is primarily liable, and the estate duty falls on residue. If, however, the legacies are payable rateably out of the mixed fund, they are freed from duty by the direction to pay testamentary expenses out of that mixed fund. *In re Sharman* (2) is distinguishable. In that case the real estate was devised on one set of trusts, and the personal estate, "after payment thereout of . . . . debts, funeral and testamentary expenses," was bequeathed on another set of trusts. It was held that the devised real estate must bear its own estate duty. In the present case the mixed fund subject to payment of testamentary expenses is all given to one residuary legatee.

The plaintiffs are accountable for the duty on the personal estate as executors under the Finance Act, 1894, s. 6, sub-s. 2, and s. 8, sub-s. 3, and for the duty on the real estate as trustees under s. 8, sub-s. 4. The testator intended them to pay all expenses arising from the devise and bequest out of the mixed fund, in whatever capacity they were accountable, and to hand the net residue to the residuary legatee. In *In re Trenchard* (3) it was held that a certain annuity was not a rent-charge, but a personal annuity payable

(1) [1894] 1 Ch. 693, 703. (2) [1901] 2 Ch. 280.
(3) [1905] 1 Ch. 82, 92, 93.

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like other legacies out of a mixed fund, and it was apparently held in consequence that a direction to pay testamentary expenses out of the mixed fund covered the estate duty on the annuity. The exact point was not argued, but the order was drawn up on that footing, and is in accordance with the headnote.

In *Berry* v. *Gaukroger* (1) a definite fund of mixed residue was appropriated by the Court to answer an annuity and deferred legacies bequeathed out of mixed residue by a testator who died twenty-five years before the Finance Act, 1894. There was a direction to pay the testator's testamentary expenses out of the mixed residue. The annuitant died after 1894, and the newly imposed estate duty on the portion of the fund representing real estate became payable on her death. This was clearly not a testamentary expense contemplated by the testator, and it was held that the legacies must bear their rateable proportion. But that was not really a case between legacies and general residue at all. It was the case of a definite settled fund of which the pecuniary legatees and residuary legatees took aliquot shares, and, as the will contained no express provision to the contrary, the newly imposed duty of course fell rateably. It has no application to the present case.

Pepys, for other legatees, adopted the same arguments.

Howard Wright, for the residuary legatee. The legacies, although direct original bequests, are payable rateably out of the mixed fund of realty and personalty subsequently created for their payment: *Roberts* v. *Walker* (2); *Allan* v. *Gott.* (3) The executors are not accountable for the duty on the amount payable out of realty, that amount being real estate, and the duty therefore falls on the beneficial interests: *Berry* v. *Gaukroger.* (1) The direction to pay testamentary expenses does not cover estate duty on realty: *In re Sharman.* (4) *In re Trenchard* (5) cannot be relied on as a decision on a point that was neither argued nor expressly dealt with in the judgment.

Cur. adv. vult.

(1) [1903] 2 Ch. 116, 131, 132.
(2) 1 Russ. & My. 752.
(3) L. R. 7 Ch. 439.
(4) [1901] 2 Ch. 280.
(5) [1905] 1 Ch. 82, 92, 93.

Nov. 14. SWINFEN EADY J. The question remaining to be determined on the present summons is whether the rateable proportion of the pecuniary legacies payable out of the real estate is to bear the estate duty payable in respect of it, or whether the legatees are entitled to require that this estate duty shall be paid out of the rest of the estate.

The testator, who died on October 1, 1906, by his will, dated May 25, 1906, devised and bequeathed his real and personal estate to trustees upon trust for sale and conversion, and directed that his trustees should "out of the monies to arise from the sale calling in and conversion of or forming part of my said real and personal estate, pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto." The legacies, which are of large amount, are thus directed to be paid out of the mixed fund, and, according to the principle enunciated in *Roberts* v. *Walker* (1) and *Allan* v. *Gott* (2), the legacies are payable pro rata out of the real and personal estate. No question arises with reference to estate duty on so much of the legacies as is payable out of the personal estate.

With regard to the amount of the legacies payable out of the real estate, it is contended on one side that this amount is in the nature of real estate, and must bear its own duty; and on the other side that, having regard to the direction to pay testamentary expenses out of a mixed fund, the estate duty on the proceeds of the realty cannot be severed from the estate duty on the personalty, but that the whole must be paid out of the mixed fund.

Now the sum given out of the proceeds of sale of real estate must be treated as a disposition of real estate, and not of personal estate. It was pointed out by Sir John Leach V.-C. in *Smith* v. *Claxton* (3) that "the produce of an estate, which the devisor directs to be sold, can never be strictly part of his general personal estate. If a devisor directs such produce to be paid to his executors, and applied as part of his personal estate, the executors take it as devisees. Every person, taking an

(1) 1 Russ. & My. 752. (2) L. R. 7 Ch. 439.
(3) 4 Madd. 484, 492.

SWINFEN EADY J.

1907

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POË *v.* SPENCER COOPER.

interest in the produce of land directed to be sold, is in truth a devisee, and not a legatee."

It was decided in *In re Sharman* (1) that estate duty payable in respect of real estate is not a testamentary expense, and that the principle of *In re Clemow* (2) and *In re Treasure* (3) does not apply, as executors may obtain probate without paying the estate duty on the real estate. It was sought to distinguish *In re Sharman* (1) from the present case, as the direction there was to pay testamentary expenses out of the testator's personal estate, and not out of a mixed fund; and the recent decision of Warrington J. in *In re Trenchard* (4) was relied upon in support of the view that "testamentary expenses" includes the estate duty on some portion of the real estate. The learned judge said: "I can see a great deal of difference between a direction to pay testamentary expenses out of personalty and a direction to pay them out of a mixed fund. I think an argument may well be founded on that distinction, but I need not decide anything of the kind now."

In that case no question was argued (so far as can be gathered from the report) as to the incidence of the duty if a portion of the annuity was payable out of proceeds of sale of real estate. The widow and annuitant contended that the annuity was an ordinary annuity payable out of personal estate. The residuary legatees contended that the real question was whether the annuity was primarily payable out of the real estate. Warrington J. said that the authorities might be ranged under three heads, the first head or class being a simple gift of a legacy or annuity, with a mere charge upon real estate, and there the personal estate is not only not exonerated, but remains primarily liable; and he then said that the annuity in question came under that first class. This, however, must be read in connection with what follows: "The conclusion I have come to is that this is a mere personal annuity . . . . payable (I will not say primarily) out of the personalty. This is a mixed fund, and the annuity is payable in the same manner as the other legacies out of the mixed fund"; and then at the end of his judgment he

(1) [1901] 2 Ch. 280.
(2) [1900] 2 Ch. 182.
(3) [1900] 2 Ch. 648.
(4) [1905] 1 Ch. 82, 93.

said: "I hold that this is simply a legacy payable like the other legacies, and the incidence of the estate duty will follow from that." But there was no argument before him as to what the incidence of the duty would be on that footing, nor any decision on the point. True it is that the order as drawn up contains a declaration "that upon the true construction of the will of Edward Penny Trenchard, no part of the estate duty payable on the testator's death in respect of his real and personal estate or the interest thereon ought to be borne by the plaintiff's annuity of 500*l.*"; but, having regard to the report of the case, it cannot be considered a decision that estate duty on any portion of the real estate is included in a direction to pay testamentary expenses out of a mixed fund.

In my opinion estate duty payable in respect of real estate is not a "testamentary expense"; and the fact that "testamentary expenses" are directed to be paid out of a mixed fund does not convert into a "testamentary expense" something which would not otherwise be one. In *Sharp* v. *Lush* (1) Jessel M.R. said that he could not distinguish between "executorship expenses" and "testamentary expenses," and that "executorship expenses" were expenses incident to the proper performance of the duty of executor, in the same way as testamentary expenses were, neither more nor less.

The executor is not made accountable by the Finance Act, 1894, s. 6, sub-s. 2, or s. 8, sub-s. 3, for the duty on the real estate; and in *Berry* v. *Gaukroger* (2) Vaughan Williams L.J. stated that in all cases where the duty becomes payable for which the executor is not made accountable the duty must be paid ultimately by the persons beneficially entitled in proportion to their shares. Estate duty on the personal estate of a testator was held to be a "testamentary expense" by analogy to probate duty; but with regard to property referred to in s. 8, sub-s. 4, Vaughan Williams L.J. pointed out in *Berry* v. *Gaukroger* (2) that the terms of that sub-section making the person to whom such property passes for a "beneficial interest in possession" accountable exclude the analogy of probate duty.

The result is that the primary burden on devisees of land

(1) (1879) 10 Ch. D. 468, 470. (2) [1903] 2 Ch. 116, 131, 132.

SWINFEN EADY J.
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SPENCER COOPER, *In re.*
POË *v.* SPENCER COOPER.

(whether devised in trust for sale or not) in respect of estate duty on the land is not removed by a direction to pay testamentary expenses.

In the present case, so much of the mixed fund given to legatees as represents real estate must bear its own estate duty.

Solicitors: *G. E. C. Maconchy; Williams & James; Lee & Pembertons.*

G. R. A.

NEVILLE J.
1907
Oct. 19, 26; *Nov.* 2.

In re ORLEBAR.

WYNTER *v.* ORLEBAR.

[1907 O. 167.]

Estate Duty—Incidence—General power of Appointment by Will—Appointment—Residue—No Direction to pay Testamentary Expenses—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 8, *sub-s.* 3; *s.* 9, *sub-s.* 1.

Where a testator, in the exercise of a general testamentary power, appoints personal property, the estate duty payable in respect of the appointed property is not payable out of that property, but out of the general personal estate of the testator.

In re Moore, [1901] 1 Ch. 691, and *In re Fearnsides*, [1903] 1 Ch. 250, followed.

In re Treasure, [1900] 2 Ch. 648; *In re Power*, [1901] 2 Ch. 659; and *In re Dodson*, [1907] 1 Ch. 284, dissented from.

ADJOURNED SUMMONS.

Under her marriage settlement, made in 1834, Charlotte Orlebar had, in the events which had happened, a general power of appointment by will over one moiety of certain trust funds. In 1896 she made her will, whereby, as subsequently altered by two codicils, she appointed the same moiety of the trust funds to the plaintiffs upon trusts for the benefit of the defendant Orlebar and his children; and the testatrix gave the general residue of her personal estate (after a life interest and subject to the payment of some pecuniary legacies) to the defendant Molyneux; and the testatrix appointed the plaintiffs to be her executors. Neither the will nor the codicils contained a direction for payment of testamentary expenses.

In 1905 the testatrix died, and the question then arose as to whether the estate duty payable in respect of the appointed funds was payable out of those funds or out of the general residue of the testatrix's personal estate. There being conflicting decisions on the point, this summons was taken out to determine the question.

Austen-Cartmell, for the plaintiffs.

Sheldon, for the defendant Orlebar. The question turns mainly on the construction of ss. 8 and 9 of the Finance Act, 1894, and the meaning of the expression "property passing to the executor as such." If it means that the appointed fund passes to the executor virtute officii in the strict legal sense, then the duty is chargeable on the appointed fund, but if it means that the property passes to the executor as the party made accountable under the construction of the Act, then the duty is payable out of the general residue. In *In re Treasure* (1) Kekewich J. held that the duty was chargeable on the appointed fund; but in *In re Moore* (2) Buckley J. did not follow *In re Treasure* (1), and decided that the duty was payable out of the general personal estate. Then in *In re Maddock* (3) Kekewich J. followed his previous decision in *In re Treasure* (1) and dissented from Buckley J. These cases were considered by Byrne J. in *In re Power* (4), who followed the decision of Kekewich J. in preference to that of Buckley J.; but in *In re Dixon* (5) Buckley J. disagreed with Byrne J. The question then came before Swinfen Eady J. in *In re Fearnsides* (6), and he followed *In re Moore* (2), and again in *In re Creed* (7) followed his own decision. Lastly, in *In re Dodson* (8) Warrington J. approved and followed the decisons of Kekewich J. and Byrne J. It is submitted that the decision of Swinfen Eady J. is the more correct view, and that the duty is payable out of the general personal estate.

A. L. Morris (*Jenkins, K.C.*, with him), for the defendant Molyneux. The duty is a charge on the fund itself. We rely

(1) [1900] 2 Ch. 648.
(2) [1901] 1 Ch. 691.
(3) [1901] 2 Ch. 372.
(4) [1901] 2 Ch. 659.
(5) [1902] 1 Ch. 248, 256.
(6) [1903] 1 Ch. 250.
(7) [1905] W. N. 94.
(8) [1907] 1 Ch. 284.

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on *In re Power.* (1) In *Drake* v. *Attorney-General* (2) it was decided that property over which the deceased had merely a general power of appointment was not subject to the then existing probate duty. To obviate this result the statute 23 Vict. c. 15 was passed, which enacted (s. 4) that such property should be liable to probate duty, and (s. 5) that such duty should be a charge upon the property itself, and should be paid thereout by the trustees or owners thereof to the executor of the deceased. Probate duty is abolished by the Finance Act, 1894, and estate duty substituted in its place; but the Legislature could hardly have intended by a side wind to shift the incidence of the burden in the case of property subject to the general power of appointment, and the Court would struggle against such an interpretation of the Act. By s. 22, sub-s. 1 (*d*), the expression "executor" means executor or administrator of a deceased person, and therefore whatever can be predicated of an executor in the Act must be equally applicable to an administrator. But property over which the deceased had only a general power of appointment could not in the case of an intestacy pass to an administrator "as such"; or, in the case of a will which merely created an executor and did not expressly or by implication exercise the power, to an executor. The words in s. 9, sub-s. 1, must therefore be confined to such property as passes to an executor or administrator virtute officii in the strict sense of the words, that is, which he could claim by mere production of a grant of probate or letters of administration without reference to the contents of the will. It is not necessary to put the same meaning on the phrase "assets . . . . received as executor" in s. 8, sub-s. 3, and "property passing to the executor as such" in s. 9, sub-s. 1, as is done by Swinfen Eady J. in *In re Fearnsides.* (3) The wording is different, and designedly so, for property subject to a general power of appointment exercised by the deceased does not pass to the executor "as such," but when actually intercepted by him may be considered as "assets which he has received as executor."

If the decision in *In re Fearnsides* (3) is correct, then in any case in which the power was not exercised and the estate of the donee

(1) [1901] 2 Ch. 659. (2) (1843) 10 Cl. & F. 257.
(3) [1903] 1 Ch. 250.

of the power was insufficient to pay the whole duty, the Crown would lose the difference—for under s. 8 sub-s. 3, the administrator would be accountable, but only liable to the extent of the assets he had received; and sub-s. 4 would not be applicable, nor would s. 9, sub-s, 1, because the property ex hypothesi did pass to the administrator as such.

Cur. adv. vult.

Nov. 2. NEVILLE J. The question in the present case is whether personal property appointed by will under a general power is charged with estate duty, or whether such duty is payable out of the general personal estate. In arriving at a conclusion I have the advantage not only of the arguments of counsel, but of the judgments of no fewer than five learned judges of the Chancery Division, three of whom have decided that the appointed property is so charged and two that it is not. The point turns upon the meaning to be attached to the words "property which does not pass to the executor as such," which are found in s. 9, sub-s. 1, of the Finance Act, 1894. Before the passing of that Act it had been decided—(1.) that, in the case of a general power of appointment over personal property, the mere appointment of an executor without more does not operate as an execution of the power; (2.) that, where the power is executed and an executor appointed, the property does pass to him and become liable in equity to the payment of the testator's debts; (3.) that in the case last mentioned it does not pass to the executor virtute officii so as to become liable to probate duty prior to the Act 23 Vict. c. 15, which extended the duty to and made it a charge upon such property. Bearing these decisions in mind, I now pass to the construction of the Finance Act, 1894, itself. By s. 2, sub-s. 1 (*a*), estate duty is payable in respect of property of which the deceased was at the time of his death competent to dispose. By s. 6, sub-s. 2, it is provided that the executor shall pay the estate duty in respect of all personal property of which the testator was competent to dispose at his death. By s. 8, sub-s. 3, the executor is made accountable for the estate duty upon such personal estate to the extent of the assets which he has received as executor or

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might, but for his own default, have received. By s. 8, sub-s. 4, where property for which the executor is not accountable passes on death the person to whom it passes is accountable. By s. 9, sub-s. 1, a rateable part of the estate duty in proportion to the value of any property which does not pass to the executor as such is to be a first charge upon it. Now, that personal property appointed under a general power does pass to the executor as such in every sense except the narrow sense of virtute officii, under the decision of *Drake* v. *Attorney-General* (1), seems to me clear. It passes to him although the appointment be in favour of another, and it only passes to him because he is executor. It is true that it does not pass to him upon his appointment alone, because the power must be executed also, but, this done, it passes to him as executor. Is there any ground for applying this very narrow construction to the words? I can find none, unless it be one that a previous statute made probate duty, which is swallowed up in estate duty, a charge upon the appointed property. I see no reason to suppose that these words were intended to refer to the decision in *Drake* v. *Attorney-General* (1) and to keep alive for the purpose of estate duty the distinction between legal and equitable assets now for most purposes obsolete. If such had been the intention one would expect to find the words "virtute officii," or their exact equivalent, used. The words used in s. 9 in this regard are so similar to those used in s. 8, sub-s. 3, that, unless the context demands it, I do not think a different interpretation should be put upon them. Now, as Swinfen Eady J. has pointed out in *In re Fearnsides* (2), if you apply the restricted meaning to "received as executor" in s. 8, sub-s. 3, you get the following result, that if an executor receives personal property upon the execution of a general power, which is the only personal property of which the testator is at the time of his death competent to dispose, although the executor is bound to pay the estate duty (s. 6, sub-s. 2,) and accountable for it (s. 8, sub-s. 3,) he is not liable for it because it is not assets received by him as executor, while at the same time this duty cannot come within sub-s. 4 because the categories in sub-ss. 3 and 4 are mutually exclusive. This would not, I think, be a reasonable construction to put upon s. 8,

(1) 10 Cl. & F. 257. (2) [1903] 1 Ch. 250, 257.

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while the words in s. 9 appear to me to differ only so far as is demanded by the context. I therefore come to the conclusion that in this case the estate duty is payable out of the general personal estate, following the decisions of Buckley J. and Swinfen Eady J. rather than the decisions of Kekewich J., Byrne J. and Warrington J. The above construction, so far at all events as personal estate subject to a general power of appointment is concerned, renders it immaterial whether the testator has or has not directed his testamentary expenses to be paid out of his general personal estate. Such a direction merely expresses what the law implies, and it seems to me that the multiplication of artificial distinctions of this kind should, if possible, be avoided.

Solicitors: *Balderston & Warrens; Halse, Trustram & Co., for F. T. Tanqueray, Woburn; Burton, Yeates & Hart, for W. Parker, Thame.*

H. L. F.

PARKER J.
1907
Oct. 15, 16, 17.

In re DISCOVERERS FINANCE CORPORATION, LIMITED.

[00199 of 1906.]

Company—Winding-up—Contributory—Transfer of Shares to escape Liability—Validity—Test—Out-and-out Transfer—Bona fides—Equities between Transferor and Transferee.

The holder of ordinary shares, on each of which a liability of 12*s.* 6*d.* remained unpaid, transferred his shares in order to escape the liability, under circumstances which, the Court held, gave to the transferee the right to repudiate the transaction. The transfer was completed and passed by the board, and the name of the transferee was placed on the register as the owner of the shares. Resolutions for the voluntary winding up of the company were passed, and the liquidators now sought to rectify the list of contributories by replacing thereon the name of the transferor in respect of the shares:—

Held, that the question whether the transfer was out-and-out, in the sense that by it both the benefit and the liability on the shares had been transferred, was not the only test to be applied; the Court was bound to consider the equities between the parties and whether under all the circumstances the transaction was bona fide; this transfer was a colourable transaction, and the transferor's name must be replaced on the register.

SUMMONS by the liquidators of the Discoverers Finance Corporation, Limited, for an order that they might be at liberty to

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rectify the list of contributories of the company by placing thereon the name of G. B. Cooper as a member in class (A) in the place of that of L. Broadfoot as owner of 5000 ordinary shares.

Cooper was formerly the holder of 5000 ordinary shares of 1*l.* each in the company, on each of which there was an unpaid liability of 12*s.* 6*d.* In 1904 he had information that things were not going well with the company, and be became anxious to get rid of his liability in respect of the shares. Broadfoot was at that time a motor mechanic twenty-two years of age and under Cooper's influence.

On January 31, 1905, Cooper suggested a transfer of his shares to Broadfoot, and prepared a transfer, in which he described the latter as an engineer and stated that the consideration was 50*l.* This 50*l.* was not paid. The transfer was thereupon executed by him and Broadfoot, was passed by the board on February 3, 1905, and Broadfoot was registered as owner of the shares. In 1906 resolutions were passed for the voluntary winding up of the company and liquidators were appointed. In settling the list of contributories the liquidators came to the conclusion that the transfer to Broadfoot was fictitious, and they took out this summons with a view to replacing Cooper on the list.

The effect of the evidence is stated in the judgment of Parker J.

Article 22 of the articles of association of the company was as follows:—

"The board may decline to register any transfer of shares (not fully paid up) made to any person not approved by them, or any transfer of shares the holder or joint-holders whereof is or are, or any of whom is alone or jointly with any other person indebted or under any liability to the company on any account whatever, or any transfer of shares, whether fully paid up or not, made to an infant or a person of unsound mind."

Eve, K.C., and *John Galloway*, for the applicants. If there has been an out-and-out transfer, the Court cannot help the liquidators, provided there has been no deception, but the want of bona fides is sufficient to justify the interference of the Court, and the onus always lies on the transferor to shew that he has

parted with all his interest in the shares. A colourable transfer to a clerk of the transferor or other person will not discharge the transferor from liability: *Hyam's Case* (1); *Costello's Case.* (2) In *Budd's Case* (3) the facts were very like those of the present case. There the transferor was unsuccessful in his attempt to evade liability, and the Court had regard to the equity which the transferee has in these cases against the transferor. The reservation of a benefit to the transferor will prevent the transfer from being effective to free him from liability: *Chinnock's Case.* (4)

Even if the transfer is out-and-out the transferor will not escape liability, if the registration of the transfer is obtained by misrepresentation as to the position of the transferee, as in this case: *Payne's Case* (5); *Williams' Case* (6); *Snow's Case.* (7) Misrepresentation as to the consideration for the transfer is also a ground for disregarding it as a bona fide transaction: *Ex parte Kintrea.* (8) [They also referred to *Lund's Case* (9); *De Pass's Case.* (10)]

H. Terrell, K.C., and *E. Clayton*, for Cooper. This question does not depend upon whether Broadfoot has any equity as against Cooper to set aside the transaction. The company have not that equity. At all events, until it has been established by legal proceedings, that equity is immaterial. The test is whether this was a real out-and-out transfer, in the sense that the parties intended that the shares should really, and not as a mere device, become the shares of Broadfoot: *Slater's Case* (11); *Masters' Case.* (12) The fact that Cooper's main or only motive was to relieve himself from liability is immaterial. He was entitled to do that if he could get somebody to take the shares and execute a transfer. It may be that Broadfoot was misled as to the risk he was undertaking, but he admits that he accepted the position of transferee. Therefore there was an actual transfer of the shares from Cooper to him.

(1) (1859) 1 D. F. & J. 75.
(2) (1860) 2 D. F. & J. 302.
(3) (1861) 3 D. F. & J. 297.
(4) (1860) John. 714.
(5) (1869) L. R. 9 Eq. 223.
(6) (1869) L. R. 9 Eq. 225, n.
(7) (1871) 19 W. R. 1057.
(8) (1869) L. R. 5 Ch. 95.
(9) (1859) 27 Beav. 465.
(10) (1859) 4 De G. & J. 544.
(11) (1866) 35 Beav. 391, 394.
(12) (1872) L. R. 7 Ch. 292.

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The company have registered the transfer, and they cannot say it was only a fiction, because both parties intended that it should be an actual transfer. All the authorities depend upon whether there has been an actual completed transfer or not. In *De Pass's Case*(1) it was held that a transfer in circumstances very like the present was good because by it the shares were "absolutely and bona fide parted with by the appellants out-and-out, without any trust for their benefit, or any reservation whatever." In *Hyam's Case* (2), *Costello's Case* (3), and *Budd's Case* (4) the transferors' names were replaced on the list on the ground that the transfers had been fictions. It may be that in the present case the transfer was not a sale, but a gift; but that is enough. There was a bargain between the parties resulting in an out-and-out transfer. Broadfoot became a shareholder, and took over all the liabilities and benefits of the shares. In *Chinnock's Case* (5) the transferor retained the beneficial interest in the shares.

Here Broadfoot is the registered shareholder, therefore the burden of proof is on the liquidators to shew that the transaction was not an out-and-out transfer, and they have failed to prove their case. They have not attempted to make out any case of misrepresentation by which the board were induced to register the transfer, and they cannot do so now. Further evidence would be necessary for that purpose.

[It was arranged that the question of misrepresentation should stand over.]

Eve, K.C., in reply. There was no bargain between the parties, and, having regard to the relationship between him and Cooper, it is clear that Broadfoot was not in a position to make a bargain. The shares were a damnosa hæreditas, and could not form the subject of a gift. Even if Cooper did in fact denude himself of the shares and they became vested in Broadfoot, the transaction cannot stand. This is more than an equity on Broadfoot's part to set aside the transaction. The transaction itself is void on account of the relationship between the parties and the absence

(1) 4 De G. & J. 544, 558.
(2) 1 D. F. & J. 75.
(3) 2 D. F. & J. 302.
(4) 3 D. F. & J. 297.
(5) John. 714.

of independent advice to Broadfoot, unless Cooper can rebut that presumption; and he has not attempted to do so.

PARKER J. In this case there is a considerable conflict of evidence, but I have considered what was said by the various witnesses, and their demeanour in the box; and I have taken advantage also of the adjournment to read through the notes of the evidence which I took yesterday and the day before. On the whole I find the following facts: Mr. Cooper was the holder of 5000 ordinary 1*l.* shares in the Discoverers Finance Corporation, Limited, on each of which 7*s.* 6*d.* had been paid, leaving an unpaid liability in respect of each share of 12*s.* 6*d.* He had information that things were not going well with the company, and he was exceedingly anxious to get rid of his liability in respect of the shares. Broadfoot, whose name is now on the list of contributories in respect of these shares, was at the time a youth of twenty-two years of age. Cooper had known him for many years, had befriended him in various ways, and was on intimate terms of friendship with his mother, Mrs. Mulreany. Broadfoot was a motor mechanic, having served an apprenticeship at some motor works, and is now, and has been for some time past, engaged as a chauffeur. Cooper had paid for his education, and had generally looked after him from an early period of his life. Under these circumstances Cooper conceived the idea of getting rid of his liability by a transfer of his shares to Broadfoot. Cooper says that though his main object was to get rid of his liability he also thought that he might be conferring a benefit on Broadfoot in the event of the shares by any means turning out ultimately to have some value. I do not, however, think that Cooper had any real belief in the possibility of the company being a success; on the contrary, I believe that he calculated on the past benefits he had conferred on Broadfoot as likely to induce the latter to assent to relieve him of his liability on the shares. Cooper said in the box that he arranged for and obtained Broadfoot's consent to the transfer of the shares through Mrs. Mulreany, and only proceeded to prepare the papers relating to the transfer on hearing from her that Broadfoot would consent to take a transfer. I disbelieve Cooper's evidence in this respect, and I find that

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he prepared the transfer without consulting Broadfoot, or any one on his behalf, and first proposed the transfer to Broadfoot at the interview when it was produced for his signature. With regard to what happened at this interview when the transfer was executed, I accept Broadfoot's statement that he was asked to sign in order to relieve Cooper from his liability, and that an appeal was made to him on the ground of the past benefits which he had received from Cooper. At first Broadfoot demurred because of the possible risks involved, but he was assured by Cooper that there was no real risk to him, because the company would never attempt to enforce the liability on the shares against a person who could not possibly pay. Ultimately he consented to sign the transfer, but I do not think that he ever considered himself as being the bona fide owner of the shares in question. On the contrary, I think he looked to Cooper to help him out of any difficulties in which his acceptance of the shares might involve him, and I think that Cooper himself knew of, and did not dissent from, this position. It is clear that as soon as Broadfoot was called upon to pay the transfer fee of 2*s.* 6*d.* he wrote to Cooper asking him to repay him that amount. It is also clear that Cooper promised to make this repayment, though he never in fact did so. I think it is also clear that as soon as Broadfoot heard that a claim would be made upon him he wrote to Cooper, if not also to Cooper's solicitors, on the subject. Cooper appears to have destroyed this letter and not to have sent any answer to it, though I think on the evidence—though the point is not absolutely clear—that after getting the letter he called on Mrs. Mulreany, spoke to her on the subject, and told her not to worry about it. There is also this further item of evidence, that Cooper appears to have sent to Broadfoot for his signature a form of proxy relating to the shares in question. Cooper says in his evidence that he told Broadfoot that, although he was taking the risk, he would also take the benefit of the shares in the company if the company proved a success. The witness to the transfer confirms this, and Broadfoot, though he does not remember it, is not prepared to contradict it. I think, therefore, that probably something of the sort took place, but I do not think either party thought there was any real chance of the company

proving a success, or that Broadfoot in any way relied upon such a chance in assenting to take a transfer of the shares. I think he assented to such transfer because he considered himself to be under obligations to Cooper, and at Cooper's request; and, as I have said before, he still considered Cooper to be the real owner of the shares and looked to Cooper to get him out of any difficulties in which the transfer to him of the shares might involve him. Lastly, it may be noticed that in preparing the transfer, before any discussion on the subject with Broadfoot, Cooper inserted a false consideration in the document of transfer. He said he did so because the real or nominal consideration would have looked ridiculous. In other words, he was anxious to give the transaction the aspect of being one of real bargain and sale, a point which is material on the question as to the bona fides of the transaction.

Now under those circumstances I cannot doubt that, considering the relations which existed between the parties, the absence or total inadequacy of any consideration moving from Cooper to Broadfoot, the fact that the latter had no independent advice whatever, and that Cooper was the very person to whom he would naturally look for advice in the matter—I cannot doubt, I say, that Broadfoot had from the first, and still retains, a right or equity to repudiate the transaction and to be restored into the position in which he was prior to the transfer. Indeed, it appears to me that the only possible way of treating the transaction as in any way honest or reasonable on Cooper's part, having regard to the relationship between the parties, is to assume that it was Cooper's intention—as I have no doubt that Broadfoot thought would be the fact—that Cooper would see Broadfoot through any difficulties which might be occasioned by the transfer.

Now the question is whether under those circumstances, having regard to the decisions on the point, I can hold, not that Broadfoot, but that the company or its liquidators, have a right to treat the transaction as a nullity and to remove, in consequence, Broadfoot's name from the list, setting in place thereof the name of Cooper, the original owner. I have come to the conclusion that I ought to take all the facts into consideration, and

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that I may, in considering the position of the company, consider also the position of affairs between Cooper and Broadfoot. It is said on behalf of Cooper that I cannot consider any equity existing between him and Broadfoot, such as an equity to set aside the transaction because of unfair dealing or the position of the parties or some other equitable ground; and that the sole and only test in cases of this sort is whether the transfer was an out-and-out transfer in the sense that both the benefit, if any, as well as the liability, was to be transferred in the contemplation of the parties. It appears to me to be perfectly clear on the cases that if any interest is retained under such circumstances by the transferor, or if the transferor transfers on the understanding that he will indemnify the transferee from the liability, the Court will interfere and will rectify the register by settling the name of the transferor upon the register; but I do not think that, according to the cases, the real test is confined to the question whether the transfer is an out-and-out transfer, or is made subject to some reservation of interest, or with the benefit of some contract of indemnity. I think that I am bound, according to the cases, to consider whether, irrespective of that point, the transaction was a bona fide transaction.

Now, referring in more detail to the cases, the first which I will mention is *Lund's Case* (1), which I think is one of the earliest. In that case a few days before an order to wind up was made, the company being then in considerable difficulties, a shareholder transferred his shares to his foreman. I do not think I need state further the facts of the case, but I will read what the Master of the Rolls says. He says: "I am satisfied on the statement of Mr. Lund himself, that this was not a bona fide sale of the shares." That was a statement which contained an account of the interview at which the shares were transferred, and expressly asserted that according to the intention of the parties any benefit that there might be from the shares was intended to be transferred as well as the liability, so that there was no reservation of interest or contract of indemnity.

The Master of the Rolls goes on to say: "I am satisfied

(1) 27 Beav. 465, 470.

that, not being able to dispose of them in the market, he sold them to a person entirely under his own control, for the express purpose of getting rid of his liability. The case of *Ex parte Jessopp* (1) puts it on the bona fides of the sale, and where there is a bona fide sale, the Court will act on it; but if the transaction is tainted with anything unfair, the Court will not recognize the transfer." I think that the Master of the Rolls means by "tainted by anything unfair" unfair as between the parties to the transaction, and not unfair from the point of view of the company; and I think he is really referring to the fact that the position of the parties was such that the transferee would have an equity to treat the transaction as voidable as against the transferor.

The whole of the case of the respondent here is based practically on *De Pass's Case* (2), and that case is not really applicable to the present circumstances at all. There it appears that the shares had a market value, and that they were transferred for a sum below the market value at the time of the transfer, the object being to get rid of the liability. The transferee sold the shares at a profit, and then ensued the winding-up. In the winding-up the question arose as to who should be on the list of contributories; and it was held that under those circumstances the transfer, though a transfer to get rid of the liability, was as a matter of fact a bona fide transfer, and one which really conferred on the transferee a substantial benefit, which he had already realized. We have nothing of that sort in this case, nor, as far as I can make out, in any of the other cases which have been cited. The two cases which appear to me to be most analogous to the present case are *Costello's Case* (3) and *Budd's Case.* (4) Without going into the precise facts of *Costello's Case* (3), I should like to read what was said by Knight Bruce L.J. on the subject, in a passage which appears to me to be applicable in almost every detail to the circumstances of this particular case. He says (5): "I am of opinion upon the evidence that there was no real bargain, no true contract, nothing approaching

(1) (1858) 2 De G. & J. 638.
(2) 4 De G. & J. 544.
(3) 2 D. F. & J. 302.
(4) 3 D. F. & J. 297.
(5) 2 D. F. & J. 307.

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any idea of a substantial sale, but that the whole was an unfair device for the purpose of enabling the son to escape in an indirect and improper manner from a liability imposed upon him by law, by substituting in his own place a person who was unable to pay, and who would, in all probability, be assisted in any distress or difficulties, which might be occasioned to him by the alleged transfer, by the person who for his own purposes placed him in that position." In the present case I think every word of that is applicable. I think that there was no bona fide bargain or contract; that there was nothing approaching any idea of a substantial sale; that there was no bona fide intention of making a gift, but that the whole of the transaction was an unfair device for the purpose of enabling Cooper to escape in an indirect and improper manner from a liability imposed upon him by law, by substituting in his own place a person who was unable to pay, and who would, in all probability, be assisted in any distress or difficulties which might be occasioned to him by the alleged transfer by Cooper, the person who, for his own purposes, placed him in that position. That case appears to me to shew that the question of the transfer being intended at the time to be an out-and-out transfer is not the only test, but that the Court also has to consider whether the whole transaction was a bona fide transaction, was either a bona fide gift or a bona fide sale, or whether it was tainted with anything colourable which the Court can take advantage of in favour of the creditors of the company in the liquidation.

The other case is *Budd's Case* (1), in which Knight Bruce L.J. commences his judgment in these words (2): "In this case, considering the respective stations in life of the appellant Mr. Budd and Mr. Crocker, the former a solicitor, the latter a farm bailiff, and the fact especially that he was the farm bailiff of Mr. Budd,—considering the gratitude for kindness shewn or services rendered at some earlier period or periods to Mr. Crocker by Mr. Budd, or some member or members of his family, which Mr. Crocker probably or certainly felt,—considering the utmost amount of information as to the nature and possible effect or consequences of the transaction of assigning the shares in question to him,

(1) 3 D. F. & J. 297. (2) 3 D. F. & J. 302.

which before or at the time of accepting the assignment he can, upon the testimony before us, be taken to have had—and considering that in the transaction or with respect to it he had, if any protector or adviser, none but Mr. Budd alone, I am, upon the evidence, satisfied that Mr. Crocker had originally, nor ever ceased to have, a perfectly good title as between himself and Mr. Budd to be relieved in equity against the assignment and placed so far as possible in the same position as if it had not existed. For every substantial purpose, therefore, as between them, there has, I conceive, been continually since the assignment a clear right in equity on the part of Mr. Crocker to reject the transfer"; and on those facts as he finds them he determines that the transaction ought to be treated as colourable for the purposes of the question whether the transferor should be put upon the register. Turner L.J., after hearing that judgment, says that he is of the same opinion; and he then goes on to the farther circumstances of the case, relying also upon the fact that when the question of liability on the shares arose the transferor, in the name of the transferee, but without authority from him, had made an offer of compromise, thereby admitting, according to Turner L.J., that he considered himself as retaining some interest in the shares. But the fact that Knight Bruce L.J. considers the equity existing between the parties as sufficient in that case to justify him in deciding that the transaction was colourable, and that, therefore, it ought to be treated as a nullity in settling the list of contributories, is, I think, sufficient authority for me to say that in the present case, under all the circumstances of this transaction, having regard to the relations between the parties and to what took place at the interview, and to the want of independent advice, I am justified in saying that the transaction cannot be considered to have been bona fide, but must be held to have been colourable only. I do not think I need go into the other cases which have been cited, none of which really appear to me to conflict with the principles which are laid down in those which I have already referred to, with the possible exception of what the Master of the Rolls says in *Slater's Case* (1) as to the case of a transfer obtained by misrepresentation. I do

(1) 35 Beav. 391, 393.

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not think that, even if it be the fact that misrepresentations in obtaining the consent to a transfer cannot be relied upon in cases of this sort, that is really an authority for not taking into consideration the effect of equities arising out of the position of the parties, and not out of misrepresentations collateral to, but intended to induce the transfer.

I hold, therefore, that the transaction in question was not a bona fide transfer of shares within the meaning of *De Pass's Case* (1), but that it was a colourable transaction within the meaning of *Costello's Case* (2) and *Budd's Case* (3), and ought to be so treated in considering who should be put upon the list of contributories. I hold, therefore, that the summons to place Cooper's name upon the list of contributories must succeed.

Solicitors: *Charles Dunderdale; Rising & Ravenscroft.*

H. C. R.

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In re YOLLAND, HUSSON & BIRKETT, LIMITED.

LEICESTER *v.* YOLLAND, HUSSON & BIRKETT, LIMITED.

[1906 Y. 166.]

Company—Debentures—Registration—Certificate of Registrar—Conclusiveness of Certificate—Companies Act, 1900 (63 & 64 *Vict. c.* 48), *s.* 14.

The certificate of the Registrar of Joint Stock Companies under s. 14 of the Companies Act, 1900, is conclusive evidence that all the requirements of the section as to the registration of debentures have been complied with, and where such a certificate has been granted the Court will refuse to go into the question whether such requirements have in fact been complied with.

Decision of Warrington J., [1907] 2 Ch. 471, affirmed.

APPEAL from the decision of Warrington J. (4)

On September 1, 1903, the defendant company resolved upon the issue of a series of 200 first debentures of 100*l.* each, carrying interest at the rate of 4½*l.* per cent. per annum, and of a series of 400 second debentures of 50*l.* each, carrying interest at the rate

(1) 4 De G. & J. 544.
(2) 2 D. F. & J. 302.
(3) 3 D. F. & J. 297.
(4) [1907] 2 Ch. 471.

of 5*l.* per cent. per annum. Both these series of debentures were issued in February, 1904.

The first debentures were guaranteed by the Law Guarantee and Trust Society, Limited, and were secured by a trust deed dated February 1, 1904, and made between the company of the one part and the society of the other, by which the society were constituted trustees for the benefit of the first debenture-holders and were given a first charge upon the assets of the company.

The second debentures were in the usual form, charging the company's undertaking and all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being, subject to the conditions indorsed. Those conditions were (inter alia) as follows:—

"1. This debenture is one of a series of four hundred second debentures each for securing the principal sum of fifty pounds (which series of debentures is hereinafter referred to as the second debentures) issued or about to be issued by the company and which second debentures shall rank next in priority to a series of two hundred debentures of one hundred pounds each (hereinafter referred to as the first debentures) carrying interest at the rate of four pounds ten shillings per centum per annum.

"2. The first eighty-four of the second debentures numbered 1 to 84 both inclusive shall rank pari passu with any other of the second debentures which may be issued for the purpose of paying off or redeeming the first debentures or any of them and such first eighty-four of the second debentures and any other of the second debentures which may be issued for the last-mentioned purpose shall rank in priority to the remainder of the second debentures. . . . . Save as aforesaid each of the second debentures shall rank pari passu as a charge on the property hereby charged without any preference or priority one over another and such charge is to be a floating security."

On application for the registration of these second debentures the Registrar of Joint Stock Companies was asked, in the first instance, to register the debentures in two series, namely, first, Nos. 1 to 84, both inclusive, and so many others as might be issued to rank pari passu with them; and, secondly, the remainder of the issue. Eventually the registrar registered the whole of

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the issue as one series, merely directing that the usual particulars should be entered on the register, viz., the total amount secured by the whole series (20,000*l.*), and a short description of the property charged, and thereupon issued his certificate, dated February 11, 1904, the material part whereof was as follows:—

"Pursuant to s. 14 (6.) of the Companies Act, 1900.

"Application having this day been made for the entry on the register of the particulars required by sub-s. 4 of s. 14 of the Companies Act, 1900, in relation to a series of second debentures containing a charge (to the benefit of which the debenture-holders of the said series are entitled pari passu), created by Yolland, Husson & Birkett, Limited, by resolution passed on the 1st day of September, 1903 (and one of such debentures dated within twenty-one days of this date having been produced) I hereby certify that the total amount secured or intended to be secured by the said series is 20,000*l.*, and that all the particulars required by sub-s. 4 of s. 14 of the said Act in relation to the said series have been this day entered on the register."

The plaintiff was the holder of second debentures of both classes. On March 7, 1906, he commenced the present action on behalf of himself and all other the holders of second mortgage debentures of both classes issued by the company to enforce his security.

By an order dated April 5, 1906, the Law Guarantee and Trust Society, Limited, was added as a defendant to the action.

On November 6, 1906, an order was made for the winding up of the company.

The first debentures having become payable, the Law Guarantee and Trust Society realized the assets comprised in the trust deed and paid off the debenture-holders, and, under an order dated April 22, 1907, the society paid into Court to the credit of the action the surplus proceeds of realization subject and without prejudice to its claims for costs, charges and expenses, or otherwise.

On April 30, 1907, an order was made directing preliminary inquiries with a view of ascertaining the persons entitled to the second debentures, what (if any) was the priority among them, and what was due to them in respect of such rights.

On the taking of those accounts and inquiries an objection was raised to the validity of the registration of the second debentures.

On July 16, 1907, the Master made his certificate, leaving the question as to the validity of the registration to be decided by the Court.

This summons was taken out by the plaintiff, asking that the funds in Court might be applied in payment of what was due for principal and interest to the second mortgage debentures Nos. 1 to 84, which had priority over the other second mortgage debentures.

Warrington J. decided that the registrar's certificate was conclusive as to the validity of the registration.

The liquidator appealed.

The sub-sections of s. 14 of the Companies Act, 1900, on which the arguments turned, are fully stated in the judgment of the Master of the Rolls.

Gore-Browne, K.C., and *P. F. Wheeler*, for the appellant. These debentures were not properly registered, and are therefore void under s. 14, sub-s. 1, of the Companies Act, 1900. That section requires every mortgage or charge to be registered. Every debenture is a mortgage or charge, and each one ought to be registered. That would be quite clear if there were no pari passu clause, and in this case the second debentures do not all rank pari passu. Before the decision of *In re Harrogate Estates, Ld.* (1), it was the practice of the registrars to require every debenture to be brought in. Since that case a practice has grown up of allowing any number of debentures, having a pari passu clause, to be registered on production of one, but it is not justified by that decision. A company can always get over the difficulty by having a covering deed.

The section requires two separate things—(1.) that the mortgage should be brought in and filed, which has to be done by the company; and (2.) that it should be registered, which has to be done by the registrar. The certificate of the registrar is in any case conclusive only as to his own acts, i.e., the registration, and

(1) [1903] 1 Ch. 498, 504.

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in this case the certificate shews on the face of it that the conditions of registration were not satisfied.

[COZENS-HARDY M.R. referred to *Oakes* v. *Turquand*. (1)]

That case was distinguished in *In re National Debenture and Assets Corporation* (2), where it was held, following the dictum of Turner L.J. in *In re Northumberland and Durham District Banking Co.* (3), that a certificate of the incorporation of a company was not conclusive of the fact that seven persons had signed the memorandum of association.

Our argument is supported by the fact that the Legislature have thought it necessary, in the Companies Act, 1907, s. 10, which comes into operation on July 1, 1908, to repeal s. 14 and make special provision for the cases where there is no covering deed.

Jenkins, K.C., and *Whinney*, for the second debenture-holders, were not called upon.

E. Beaumont, for the Law Guarantee and Trust Society.

L. F. Potts, for another defendant.

COZENS-HARDY M.R. This is an appeal from a decision of Warrington J. It has been based upon arguments of the most technical character which it has been my fate to listen to for many days; and I am bound to say that, even on technical grounds, there is no foundation for it.

I approach s. 14 of the Companies Act of 1900 as one is bound to do, by considering what was the mischief which had to be remedied.

It was that companies were allowed to issue debentures, charging very frequently all their present and future assets, and there might be no means of ascertaining, at all events for a considerable time, whether any such debentures were issued; and therefore, for the protection of the general creditors of the company, or of persons desiring to trade with the company, it was thought fit to require that there should be a register of mortgages of that particular kind, not merely in the company's own books, but kept by the registrar. That is worked out in s. 14 in various ways. A little ambiguity has been caused, I think, by the use of the

(1) (1867) L. R. 2 H. L. 325. (2) [1891] 2 Ch. 505.
(3) (1858) 2 De G. & J. 357, 371.

word "file," which is an entirely inaccurate word in a case of this kind. The Act says "Every mortgage or charge created by a company after the commencement of this Act and being either (*a*) a mortgage or charge for the purpose of securing any issue of debentures; or (*b*) a mortgage or charge on uncalled capital of the company; or (*c*) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or (*d*) a floating charge on the undertaking or property of the company, shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation. . . . ." Then it goes on to deal with property outside the jurisdiction. That is not material. "Filed with the registrar" really means "supplied to the registrar for registration" or "furnished to the registrar for registration." Whose duty is it to do that? It is the duty of the company. Sub-s. 7 of the same section says: "It shall be the duty of the company to register every mortgage or charge created by the company and requiring registration under this section, and for that purpose to supply the registrar with the particulars required for registration. . . . ."

I shall point out in a minute what is the meaning and effect of that section as explained by the forms which have parliamentary sanction.

Sub-s. 3 imposes a duty on the registrar. It says: "The registrar shall keep, with respect to each company, a register in the prescribed form of all such mortgages and charges created by the company after the commencement of this Act, and requiring registration under this section, and shall, on payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge."

Sub-s. 3 must be read with and qualified by sub-s. 4. Sub-s. 4 says: "Provided that where a series of debentures containing any charge to the benefit of which the debenture holders of

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that series are entitled pari passu is created by a company, it shall be sufficient"—to do what? "To enter on the register—(*a*) the total amount secured by the whole series; and (*b*) the dates of the resolutions creating the series and of the covering deed, if any, by which the security is created or defined; and (*c*) a general description of the property charged; and (*d*) the names of the trustees, if any, for the debenture holders." It will be observed that there is no requirement there whatever for any entry of the names of any debenture-holders. If there is no covering deed there is nothing whatever required in sub-s. 4 except the total amount secured, the date of the resolution, and a general description of the property. Surely there is good sense in that. One must read this s. 14 with some knowledge of the ordinary course of business in these matters. One knows that a company first of all passes a resolution authorizing the issue of debentures to a large amount. There may or there may not be a covering deed. In the present case there is no covering deed. The material thing for public purposes is not the name of the particular debenture-holder, or any of those particulars which are required in sub-s. 3, but it is to know what is the amount that is authorized, what was the date of the resolution authorizing it, and what is the description of the property charged.

It was quite obvious that in the case particularly of debentures, and indeed of all securities requiring registration under this section, it would be so difficult as almost to be impossible for the person entitled, or claiming to be entitled, to the charge to prove that all the requirements in this section had been complied with; it would have been almost worse than perusing an abstract of title to a freehold or a leasehold estate. The Legislature thought that that would be an unendurable state of things, and said (s. 14, sub-s. 6): "The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of this section" (that means either under sub-s. 3 or sub-s. 4), "stating the amount thereby secured (which certificate shall be conclusive evidence that the requirements of this section as to registration have been complied with)." Pausing there, that means not merely that he has done his mechanical duties, but

that that has been done which is required to be done by any person upon whom a duty is imposed by this Act in order to get the benefit of the security, including the company itself. Then it goes on, "and the company shall cause a copy of the certificate so given to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered." What was done here? A resolution was passed, the date of which is given in this certificate. The amount sanctioned by the resolution was 20,000*l.* That is stated in the certificate. The property charged is stated in one of the debentures which is referred to in the documents, and which has been produced and read. Under those circumstances, with regard to this certificate which was issued for the very purpose of being used and put upon the debentures in order that debenture-holders might have perfectly satisfactory evidence that that which was necessary for the validity of the charge had been given, it is argued that we are to go behind that and to disregard it, and to consider whether or not there was any mistake made by the registrar, and whether or not he ought to have said that all these debentures must be deposited with him before he gave the certificate.

I said that I would refer to one of the statutory forms. Form 47, issued under the Act of 1900, seems to me to throw some light upon this matter. It purports to be, and it is, particulars of a mortgage or charge created by the company—in fact, that which is contemplated by sub-s. 7, the only thing which is required to be done by the company, the doing of which satisfies all the obligations of the section. The first column gives the "date of creation of the mortgage or charge; or, in the case of a series of debentures, the date of the covering deed (if any)." That column does not apply here. There is no covering deed. Then the "amount secured by the mortgage or charge; or, in the case of a series of debentures, the total amount secured by the whole series." That applies here, because the amount is 20,000*l.* Then the "dates of resolutions creating the series of debentures"; then "short particulars of the property mortgaged or charged; or in the case of a series of debentures a general

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description of the property charged." That we have got. Then clause 5, which is the important one, "Names (with addresses and descriptions) of the mortgagees or persons entitled to the charge; or in the case of a series of debentures, the names, &c., of the trustees (if any) for the debenture holders." There is not a word about requiring, or even suggesting, that where there is no covering deed there is any necessity to give the particulars which sub-s. 3, if it stood alone, would seem to require of all the names of the debenture-holders.

I cannot bring myself to doubt that it would be almost shocking if we held in this case that the certificate of the registrar, which is actually indorsed on each of these debentures, did not justify the debenture-holders in saying that they had, as against the unsecured creditors represented by the liquidator, a perfectly good charge upon the assets of the company.

In saying this I must not be taken in any way to decide, or even to intimate an opinion, as to what may be the position of these debenture-holders, or any one or more of them, as between themselves and other secured creditors of the company. It is sufficient for me to say that in my opinion their security, whatever it may be, is not rendered invalid by reason of the provisions of s. 14, but that it has such effect as the law may give it.

FLETCHER MOULTON L.J. I agree.

It appears to me that this is an attempt to do that which the Legislature intended to prevent being done by the provisions of sub-s. 6 of s. 14. It has taken a step greatly in favour of the general creditors of a company in requiring that all charges should be registered; and, on the other hand, it has protected those who hold charges properly created by saying that the certificate of the public officer, the registrar, that the requirements of registration have been fulfilled shall be conclusive evidence that such is the fact, and it has given such importance to that certificate that it has made it the statutory duty of the company to indorse that certificate upon all their debentures. In this case that has been done, and now the liquidator seeks to displace a charge of which the whole of the general creditors of the company had full notice, and asks us to be astute to

discover inaccuracies of language in the statute or insufficiency in its provisions so as to assist him. So far as I can see, the arguments on his behalf are entirely based on giving a meaning to the word "filed" which the language of other parts of the section shews it cannot bear.

For the reasons given by the Master of the Rolls, and for other reasons which it is not necessary to give, but which are based upon other provisions of the section, all of which are in accordance with the interpretation he has put upon the section, I am of opinion that this appeal fails and must be dismissed.

FARWELL L.J. I agree with both the judgments that have been delivered, and I will only add that, so far as I can see, the registrar has apparently applied his mind, after hearing arguments, to the construction of sub-s. 4, and has—he may be right or he may be wrong—put a construction upon it, holding that this is a series of secondary debentures containing a charge to the benefit of which the holders are entitled pari passu. In a sense it is. It is a series of debentures which contain a charge under which eighty-four come first, and the remainder take pari passu amongst themselves; and it may be that the learned registrar took the view that, inasmuch as all the outside creditors are concerned with is the total amount to which the property to which they look will be subjected, and are wholly indifferent as to the manner in which it is divided up between the parties inter se, that is a sufficient notification for them. But, however that may be, the learned registrar has given his certificate in that form, and in my opinion the Act makes it final, and it would be quite shocking to my mind to say that a mistake, if it be a mistake, in the registration in such a matter should invalidate these charges which the debenture-holders have obtained. If there be a mistake, it is the mistake of the officer of the Court, and certainly the claim put forward now lacks any semblance of merit.

Solicitors: *Ward, Bowie & Co., for W. & E. H. Foster, Leeds; Sole, Turner & Knight, for H. March, Worcester; Gribble, Oddie, Sinclair & Johnson; Warlow & Patey.*

J. R. B.

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In re WAGSTAFF.
WAGSTAFF *v.* JALLAND.

[1906 W. 2260.]

Administration—Will—Construction—Life Interest to Wife "if she shall so long continue my Widow"—Bigamous Marriage—Secondary Meaning of "Widow."

A testator gave all his furniture, household goods and effects to his "dear wife D. J. Wagstaff"; and after various pecuniary legacies devised and bequeathed the residue of his real and personal estate to his "said wife" and two other persons upon trust for sale and to invest and pay the interest and annual produce thereof to "my said wife during her life if she shall so long continue my widow," and after her decease or second marriage, upon trust, in the events which happened, for the plaintiff. The lady whom the testator thus described as his "wife," and with whom he went through the ceremony of marriage in 1893, was at that time the wife of A. G. Jalland, to whom she had been married in 1884, and who was still living:—

Held, on the evidence, that the testator knew at the time he went through the ceremony of marriage that the lady was then the wife of A. G. Jalland, and, consequently, that upon the true construction of this will she was entitled to a life interest in the residuary estate unless and until she contracted a marriage subsequent to the death of the testator.

Decision of Kekewich J., [1907] 2 Ch. 35, affirmed.

Appeal from a decision of Kekewich J. (1)

The only question raised by this appeal which requires any notice in this report was the proper construction to be placed, under the circumstances, on the words "widow" and "second marriage" as used by this testator in providing for the lady with whom he had gone through the ceremony of marriage, but who was not in fact his wife.

The will and some of the facts are set out in greater detail in the report of the case in the Court below, but the following summary of the material portions of the history of the case is sufficient for the purposes of this report.

In March, 1884, the defendant Josephine Jalland was married

(1) [1907] 2 Ch. 35.

at Manchester to one Alfred Gibson Jalland, a medical student. Immediately after the marriage the parties separated and lived apart by mutual consent. A. G. Jalland, however, was still living, and the marriage had never been formally dissolved.

In December, 1903, James Poole Wagstaff, the testator, went through the ceremony of marriage with Josephine Jalland, who then described herself as a widow, at St. George's, Hanover Square, by special licence. After the ceremony they went to live at the testator's residence, Manor Park, Potton, in Bedfordshire, where they lived together as husband and wife until the death of the testator. There was issue one child, a daughter, who died an infant before the testator.

On March 31, 1897, the testator made a will, by which he gave his furniture, household goods and effects "to his dear wife Dorothy Josephine Wagstaff" (the same person as the defendant Josephine Jalland) for her own absolute use and benefit, and after various pecuniary legacies the testator devised and bequeathed the residue of his real and personal estate to his "said wife" and two other persons upon trust for sale, and to invest and pay the interest and annual produce thereof to "my said wife during her life if she shall so long continue my widow for her own use and benefit; and upon or after her decease or second marriage" to stand possessed of the said residuary estate upon trust, in the events which happened, for the plaintiff.

On September 2, 1903, the testator died; he was never married to any other woman. The defendant Josephine Jalland continued to reside at Manor Park, Potton.

In July, 1906, this action was commenced for the administration of the testator's real and personal estate, and for a declaration that, in the events which had happened, the plaintiff was entitled to the real and personal estate of the testator.

On November 19, 1906, the defendant Josephine Jalland surrendered herself at West London Police Court on a confession of bigamy, and in the following January she received a nominal sentence of three days' imprisonment.

The trial in the Court below occupied some six days, the main issue, on which a great deal of evidence was taken, being whether the testator, when he went through the ceremony of marriage

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with the defendant, knew as a fact that she was at that time the wife of A. G. Jalland, who was still living.

Kekewich J. decided this issue in the affirmative, and, on the question of construction of the will which was then argued, held that the testator meant to use the word "widow" in a secondary sense, and that the defendant was consequently entitled to a life interest in his residuary estate until she contracted a marriage subsequent to the death of the testator.

The plaintiff appealed on the main issue and question of construction.

P. O. Lawrence, K.C., and *P. F. Wheeler*, for the appellant. It is a question of construction whether the word "widow" has any other than its ordinary meaning; its meaning may be altered by the fact that the testator knew when he made his will that the lady was not his wife. If this testator did not know this fact, then the case is exactly within *In re Boddington*. (1)

[FLETCHER MOULTON L.J. In that case the testator contemplated the lady being his widow; here that could not have been so, assuming the testator knew the fact of her husband being alive.]

The testator contemplated a status of some kind of widowhood. Suppose the secondary meaning is given to the words "wife" or "widow" of "reputed wife" and "reputed widow," then the defendant ceased to be the testator's widow in the secondary sense when she had to drop his name and publicly announce, on being convicted of bigamy, that she was no longer his widow and never was his wife. She cannot, therefore, now fulfil the condition of being the person living as his widow in the secondary sense, and the gift over takes effect. If the Court will not accept either of these propositions, then we say that on the evidence the testator had no knowledge at the time he went through the ceremony of marriage with the defendant that she was at that time a married woman.

[Counsel then proceeded to read through and criticize the whole of the evidence taken in the Court below in order to shew that

(1) (1884) 25 Ch. D. 685.

the evidence of the principal actors in this story could not be relied upon; and also as to the admissibility of certain evidence which Kekewich J. had excluded.]

Levett, K.C., and *J. G. Wood*, for the defendant Josephine Jalland, were not called upon.

Ingpen, K.C., and *Vaughan Hawkins*, for the trustee of the will.

COZENS-HARDY M.R., after examining some of the principal facts deposed to in the evidence, and giving his reasons for coming to the same conclusion as the learned judge in the Court below, continued:—I therefore approach the construction of the will, adopting the finding of fact arrived at by the learned judge in the Court below, and on the assumption that the testator knew when he penned his will in the year 1897 that this lady with whom he had gone through the ceremony of marriage was not really his wife; and on that assumption I am bound to say, speaking for myself, that I feel no difficulty in the construction of this will; in fact, I think it is reasonably clear. The testator first of all gives certain furniture and effects to "my dear wife, Dorothy Josephine Wagstaff, for her own absolute use and benefit." Now there is not a moment's doubt as to who is meant by that. The testator means beyond all doubt, and it has not been disputed, the lady with whom he went through the form of marriage at St. George's, Hanover Square. He appoints this lady again, under the description of his "said wife," as one of his executors. Then he gives his residuary estate upon trust for sale and conversion, and then come these words: "And do and shall pay the residue or surplus of the said dividends interest and annual produce unto or authorize or permit the same to be received by my said wife during her life if she shall so long continue my widow for her own use and benefit. And upon or after her decease or second marriage"—then over. Now, what does that mean? Surely it means this: "I give the income of my residuary estate to be received by the lady with whom I went through the form of marriage at St. George's, Hanover Square, during her life, if she shall so long continue my widow, for her own use and benefit, and upon her decease or

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second marriage, then over." He has himself interpreted it by the words "continue my widow" there—"continue my widow until she marries again." Given his knowledge of the facts, I am bound to say that I think the learned judge, in the declaration which he made on the construction of this will, was perfectly right, and that this lady is entitled to the income of the estate during her life or until her second marriage. If I wanted any aid to the interpretation in the body of the gift, I should certainly find it in the language of the gift over. The property is given over only upon her decease or upon her second marriage.

For these reasons I think the decision of the learned judge on this question of construction was perfectly right.

FLETCHER MOULTON L.J., after dealing with the evidence, upon which he also arrived at the same conclusion, continued:—With regard to the construction of the will, I agree with the judgment of the Master of the Rolls and do not desire to add anything thereto.

FARWELL L.J. I am of the same opinion. I do not propose to go through the facts of the case. I entirely agree with what has been said by my learned brethren.

On the question of construction it is legitimate and usual for the purpose of construing a gift in a will to refer to the gift over which operates to defeat or determine that gift. The cases on the word "survivors" shew how important the gift over is. Here the testator knew that he had gone through the ceremony of marriage with a lady who had been before married; therefore when he speaks of a second marriage he knows that is not an accurate phrase, but he means her future marriage. Then he says she is to have the income so long as she continues his widow, with a gift over on her future marriage. Reading the two together, he means that she shall continue to receive the income until she goes through a further, a future, ceremony of marriage, and in that event the estate shall go over. When one analyses the construction put by the appellant on these words it is to my mind almost extravagant. They contend that the testator has said,

in the words of the psalmist, "This lady is to have this income 'until my abominable sin shall be found out.'"

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Solicitors: *George Brown, Son & Vardy; Fooks, Chadwick, Arnold & Chadwick; W. T. Coventon.*

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[1906 H. 2098.]

Access of Light — Easement — Prescription — Enjoyment — Twenty Years — Period before Action — "Consent or Agreement" — Tenant — Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *ss.* 3, 4.

Sects. 3 and 4 of the Prescription Act, 1832, must be read together, as explained by Lord Macnaghten in *Colls* v. *Home and Colonial Stores*, [1904] A. C. 179, at p. 189, with the result that a right to access of light is not absolute and indefeasible, even after twenty years' enjoyment, unless and until some action or suit is commenced in which this right is called in question; until that occurs the right remains inchoate.

In an action to restrain interference with light, the only material period to be considered is the period of twenty years prior to the issue of the writ.

It is competent for the tenant in occupation of the dominant tenement to give the "consent or agreement" mentioned in s. 3 (*semble*), though by doing so he may prejudicially affect the landlord's inchoate right. Rights under s. 3 are acquired or lost by virtue of the acts or acquiescence of the occupier, and not by virtue of his title.

Tapling v. *Jones*, (1865) 11 H. L. C. 290, discussed and explained.

Simper v. *Foley*, (1862) 2 J. & H. 555, doubted.

Decision of Parker J., [1907] 2 Ch. 516, affirmed.

APPEAL from a decision of Parker J. (1)

The facts are set out in greater detail in the report of the case in the Court below, but the following summary is sufficient for the purposes of this report.

In 1877 John Cox built a cowshed in the rear of Nos. 112, 114, and 116, Harris Street, Camberwell, with eight windows looking south over adjoining vacant land, and in December, 1878, took a twenty-one years' lease thereof from the freeholders, three persons named Hyman.

(1) [1907] 2 Ch. 516.

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In 1883 one Van den Bergh became the owner of this vacant land, but did nothing to obstruct the uninterrupted access of light to the cowshed windows till July, 1896, when he caused the lights to be obstructed by boards. This obstruction, however, only remained up a very short time. At the end of 1898 the windows were again obstructed on the instructions of Van den Bergh, and the obstruction was again pushed down.

In January, 1899, Cox, in the belief that he had not been in uninterrupted enjoyment of the light to these windows for twenty years and in order to avoid litigation, gave Van den Bergh's agent the following memorandum:—

"Dear Sir,—I will give you 1*s.* per annum for the use of those eight lights you have boarded up in my cowshed."

In reliance on this memorandum (which was stamped as an agreement) Van den Bergh refrained from re-erecting the obstruction, and Cox remained in undisturbed enjoyment of the light till June, 1906, when he left. Shortly after this the windows were again obstructed, and on July 11, 1906, the present action was commenced by the freeholder against Van den Bergh claiming an injunction to restrain the defendant from obstructing the "ancient lights" of the plaintiff.

Parker J. held that the memorandum of January, 1899, was a "consent or agreement" in writing within the meaning of s. 3 of the Prescription Act, 1832, and that, as there had not been an enjoyment of light, without such agreement, for twenty years next before the commencement of the action, the plaintiff had not acquired an absolute right to the access of light under the Prescription Act, and that the action failed.

The plaintiff appealed.

Buckmaster, K.C., and *Ward Coldridge*, for the appellant. By s. 3 of the Prescription Act, 1832, it is provided that where the access of light has been actually enjoyed with the building for its full period of twenty years "the right thereto shall be deemed absolute and indefeasible"; no stronger words could be used. In 1899, when the memorandum was given by Cox, a period of twenty years of uninterrupted enjoyment of these lights had elapsed, and the plaintiff had an absolute right to an easement

of light, which could not be extinguished except by a formal release or some act of abandonment. The memorandum of January, 1899, would not be sufficient even if signed by the plaintiff as owner in fee; and it was only signed by Cox, the lessee. When a right has become indefeasible by statute, why should it become defeasible unless an action is at once commenced to have it declared that it is absolute? And yet that is the result of s. 4, according to the decision now under appeal. *Ecclesiastical Commissioners for England* v. *Kino* (1) is in favour of the appellants. It is not necessary to read ss. 3 and 4 together: *Simper* v. *Foley* (2); *Ladyman* v. *Grave*. (3)

[COZENS-HARDY M.R. referred to *Colls* v. *Home and Colonial Stores*. (4)]

In *Tapling* v. *Jones* (5) Lord Westbury, referring to s. 3, says, "after an enjoyment of an access of light for twenty years without interruption, the right is declared by the statute to be absolute and indefeasible, and it would seem therefore that it cannot be lost or defeated by a subsequent temporary intermission of enjoyment, not amounting to abandonment." Sect. 4 is an enabling, not a disabling, provision, and cannot be read into s. 3 for the purpose of defeating an "absolute and indefeasible right." The Prescription Act has not taken away any of the modes of claiming easements which existed before that Act: *Aynsley* v. *Glover* (6); *Dalton* v. *Angus* (7)—e.g., by title based on a presumed grant.

[*Mark Romer, K.C.* This point was not raised by the pleadings, and cannot be raised now.

Counsel proceeded to argue that the pleadings, as framed, were sufficient to enable this question to be raised, but, as the Court ruled against them, it is not considered necessary to repeat their argument on this point.]

As a fact this light has been enjoyed down to the commencement of the action; the so-called agreement was not necessary, because at the time it was given the plaintiff had an absolute

(1) (1880) 14 Ch. D. 213.
(2) (1862) 2 J. & H. 555.
(3) (1871) L. R. 6 Ch. 763, 768.
(4) [1904] A. C. 189.
(5) 11 H. L. C. 290, 304.
(6) (1875) L. R. 10 Ch. 283.
(7) (1881) 6 App. Cas. 740.

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right, and consequently the light was not enjoyed since 1899 by virtue of any "consent or agreement," as in *Bewley* v. *Atkinson*. (1) This agreement, too, was given, not by the owner, but by the lessee, and it is not an operative agreement: *Mitchell* v. *Cantrill* (2), where reservations by a lessee are discussed. The Court will not allow a right acquired by the reversioner to be taken away by the action of his tenant, over whom he has no control. If a tenant can give away his landlord's rights by letter, why should not a receiver or caretaker be in the same position? The observations of Lord Hatherley in *Ladyman* v. *Grave* (3) are in the plaintiff's favour, and there is no authority against the proposition that when once a landlord has acquired a right to the access of light that right can be given away by the tenant. The right is acquired by virtue of the access of light to the building, not by the enjoyment by the tenant. Such a right can be acquired by an unoccupied house: *Courtauld* v. *Legh* (4); *Collis* v. *Laugher*. (5) There is a great distinction between acquiring a right-of-way and a right to light: *Moore* v. *Rawson*. (6) The tenant cannot bind the inheritance, either by his own act or by his neglect: *Daniel* v. *North*. (7) The "consent or agreement" referred to in s. 3 must be the consent or agreement of the person whose rights are being interfered with, i.e., the owner; these rights cannot be given away by a document of the nature of this memorandum of January, 1899, which was given by the tenant.

Mark Romer, K.C., and *Martelli*, for the respondent, were not called upon.

Cur. adv. vult.

Nov. 27. COZENS-HARDY M.R. This is an appeal by the plaintiff from a judgment of Parker J., who held that the plaintiff had not established a right to the access of light through certain windows in a cowshed. In my view the plaintiff's case must stand or fall as a claim under the Prescription Act. If it had been intended to rely upon any title under a lost grant, as

(1) (1879) 13 Ch. D. 283.
(2) (1887) 37 Ch. D. 56.
(3) L. R. 6 Ch. 763, 768.
(4) (1869) L. R. 4 Ex. 126.
(5) [1894] 3 Ch. 659.
(6) (1824) 3 B. & C. 332, 339.
(7) (1809) 11 East, 372.

to the possibility of which title in a case like the present I desire to express no opinion, I think it ought to have been pleaded: see *Smith* v. *Baxter*. (1) No such case was pleaded: and no such case was raised in the Court below, nor was any leave asked to raise such a case by way of amendment.

It is often asserted that an absolute right is obtained to access of light by reason merely of twenty years' undisturbed enjoyment, but I think this statement is too wide. Lord Macnaghten in *Colls* v. *Home and Colonial Stores* (2), after referring to certain "expressions not perhaps sufficiently guarded" which are to be found in the judgment in the House of Lords in *Tapling* v. *Jones* (3), said: "In that case Lord Westbury, Lord Cranworth, and Lord Chelmsford all assume that a period of twenty years' enjoyment of the access and use of light to a building creates an absolute and indefeasible right immediately on the expiration of the period of twenty years. No doubt s. 3 says so in terms, but s. 4 must be read in connection with s. 3; and if the two sections are read together it will be seen that the period is not a period in gross, but a period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question. Unless and until the claim or matter is thus brought into question, no absolute or indefeasible right can arise under the Act. There is what has been described as an inchoate right. The owner of the dominant tenement after twenty years' uninterrupted enjoyment is in a position to avail himself of the Act if his claim is brought into question. But in the meantime, however long the enjoyment may have been, his right is just the same, as the origin of his right is just the same, as if the Act had never been passed. No title is as yet acquired under the Act. This point seems to have been much discussed shortly after the Act was passed. It was finally settled in a series of cases at common law, beginning, I think, with *Wright* v. *Williams* (4), and including *Richards* v. *Fry* (5) and *Cooper* v. *Hubbuck*." (6) If this is to be regarded as a decision upon ss. 3 and 4, it

(1) [1900] 2 Ch. 138, 147.
(2) [1904] A. C. 179, 189.
(3) 11 H. L. C. 290.
(4) (1836) 1 M. & W. 77.
(5) (1838) 7 Ad. & E. 698.
(6) (1862) 12 C. B. (N.S.) 456.

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is of course binding upon us. If, however, it is to be regarded only as a dictum of Lord Macnaghten, I desire respectfully to say that I agree with it, and I accept it as an accurate statement of the law.

It only remains to apply the law to the facts of the present case. No action was brought by the plaintiff or any other person until the present action was commenced on July 11, 1906. The only material period to be considered is the period of twenty years prior to that date. No evidence as to what was the condition of the windows prior to that date can be regarded. Now during that period there was undoubtedly the actual enjoyment of light through the windows in question, but at the end of 1898 the windows were for a short time obstructed by the defendant. The then tenant in occupation having a doubt whether a right to light could be established, and being desirous of avoiding litigation, signed and addressed to the defendant the letter of January 18, 1899; thereupon the boards were removed, and the lights were thenceforth actually enjoyed. Under these circumstances I think it is clear that the light was enjoyed by "consent or agreement" expressly made or given for that purpose by writing. It is true that it was made or given, not to or with the freeholder, but to or with the tenant in occupation. The tenant in occupation was the proper person to make such agreement or to obtain such consent as the section requires. In my view it is a fallacy to say that the freeholder had an absolute right which his lessee ought not to be permitted to defeat. In truth he had only an inchoate right which never became an absolute and indefeasible right. The judgment of Parker J. so carefully deals with the law applicable to the case under the Prescription Act that I do not think I should be justified in saying anything more. In my opinion this appeal must be dismissed with costs.

FLETCHER MOULTON L.J. In my opinion the only question for our decision is whether the plaintiff can establish a title to the lights in question under ss. 3 and 4 of the Prescription Act. The pleadings, the conduct of the case in the Court below, and the facts alike preclude all other questions.

The combined operation of these two sections renders it necessary for a plaintiff, in establishing his title to lights, to prove uninterrupted enjoyment of the lights for a consecutive period of twenty years. But it is not every consecutive period of twenty years that satisfies the requirements of the statute. It must be a period immediately previous to and terminating in some action or suit in which the right "shall be or shall have been brought into question." Now in the present case it is common ground that there is but one such action or suit, namely, the present action, which was commenced on July 11 1906. The only question, therefore, that we have to decide is whether these lights were enjoyed uninterruptedly from July 11, 1886, until the issue of the writ in this action, and if in fact such was the case we must then consider whether any portion of that enjoyment was by virtue of "some consent or agreement expressly made or given for that purpose by deed or writing."

That there was enjoyment in fact is uncontested, but it is also uncontested that from January 18, 1899, to the date of the claim by the plaintiff, this enjoyment was under the agreement of January 18, 1899. In my opinion this agreement fully satisfies the provisions of s. 3, and prevents the acquisition by the plaintiff of a title to the easement in dispute by reason of any enjoyment during the period when it was in force.

The case which is sought to be made on behalf of the plaintiff is that at the date at which this agreement was made a period of twenty years of uninterrupted enjoyment of the lights had already elapsed. I will assume in favour of the plaintiff that this was the case, although in my opinion the Court has no title to inquire into what has happened outside of the period of twenty years immediately preceding the suit, excepting in cases which come under s. 7 of the Act. Assuming this, as I have said, in favour of the plaintiff, it was possible at that date, by taking legal proceedings to assert the right, to convert that period of twenty years of uninterrupted enjoyment into a period which would satisfy the requirements of ss. 3 and 4 of the Act. But this course was not in fact taken, and therefore the right never became absolute. Whilst it was still inchoate the agreement

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was entered into which altered the character of the enjoyment in a manner fatal to its leading to the acquisition of the right.

The argument addressed to us by counsel on behalf of the appellant was mainly based on the supposed hardship of allowing a right acquired by the reversioner to be taken away by the action of his tenant. In my view the question is merely one of interpretation of a statute, and even if I sympathized with these views I should not permit any question of hardship to induce me to put a strained interpretation on the language of a statute such as the Prescription Act, which embodies a general policy intended to be applicable to all cases. But in my opinion the argument rests upon a fallacy. As explained by Lord Macnaghten in *Colls* v. *Home and Colonial Stores* (1), the right is not absolute and indefeasible even after the expiry of twenty years' enjoyment, unless and until some action or suit is commenced in which the right is in question. Until that occurs the right remains inchoate. Now it must be remembered that the right is not given by the landlord to his tenant, but is obtained through the continuous enjoyment by the tenant. It is clear beyond argument that during the period of twenty years the tenant is fully at liberty to secure for himself the enjoyment of the light by such an agreement with his neighbour as is referred to in s. 3, and it appears to me that, in the absence of specific contractual obligation, there is nothing which renders it obligatory on him to abstain from making similar agreements for securing for himself the enjoyment of the light at any other time so long as the right is still inchoate. I can see nothing which makes it incumbent upon him to assert by action his own right or that of his landlord. He may well believe, as it is clear in this case the defendant did believe, that he is not in a position to establish a legal right to the easement, and so may prefer to secure it by more peaceful means. The subsequent discovery that he might have been able at that time to make good his right, had he elected to put it to the test of legal proceedings, does not in my opinion affect either the propriety or the consequences of the course which he elected to take. The law permits a reversioner to profit by the continuous enjoyment

(1) [1904] A. C. 179.

of light by his tenant, but he must take that enjoyment with all its incidents, and, as in this case it was for a portion of the critical period under and by virtue of a written agreement, it does not operate to give to the reversioner any right to the continued enjoyment of the light.

For these reasons I am of opinion that the decision of the learned judge in the Court below was correct, and that this appeal fails.

FARWELL L.J., after shortly stating the dates and facts, continued:—The action is based entirely on the Prescription Act, and the appellant contends that by virtue of s. 3 of that Act an absolute indefeasible easement over the vacant land of the defendant became annexed to his cowshed in 1897, and that such easement could thereafter be extinguished only by release, or by such other acts as have been considered sufficient by the Courts; that the letter of January 18, 1899, would not be sufficient for that purpose even if signed by the owner in fee of the dominant tenement, and that a mere tenant from year to year could in no case, and by no acknowledgment or writing, extinguish such easement. The contention is in my opinion erroneous in treating s. 3 as independent of s. 4. I do not doubt that under s. 3 a right arises which may or may not ripen into a complete easement and a right which is of value, inasmuch as a house with windows that have overlooked adjacent land for twenty years without acknowledgment is of more value than a similar house with new windows; but this right is only inchoate in the sense that it cannot be enforced at law under the Act. When the right is once called in question, and a writ is issued, the terminus a quo and the terminus ad quem of the twenty years required by the Act are both settled; there is only one such period relevant for the purposes of action, and that is the twenty years immediately before writ. The two sections must be read together, as is stated and explained by Lord Macnaghten in *Colls* v. *Home and Colonial Stores*. (1)

It is said, however, that there is authority against this view, and Lord Hatherley's decision when Vice-Chancellor in *Simper*

(1) [1904] A. C. 189.

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v. *Foley* (1) and his dicta in *Ladyman* v. *Grave* (2) when Lord Chancellor are cited. The decision in the former case appears to proceed on the basis that in 1837 the plaintiff's right had become absolute and indefeasible under s. 3 (see p. 563), and were suspended by unity of ownership until 1860, and revived on severance. If this decision rests on the statute, I am constrained to say that in my opinion it cannot be supported, but it may well be correct on the grounds on which *Aynsley* v. *Glover* (3) was decided, i.e., independently of the statute; but this will not help the present appellant. The decision in *Ladyman* v. *Grave* (2) is not material, nor do I think it contains any dictum which really helps the appellant. The case of *Aynsley* v. *Glover* (3), also cited by the appellant, is not a decision under the Act at all, but proceeded on enjoyment from time immemorial, and is a decision that the right to light can still be claimed, in the case at any rate of interruption by unity of possession only, independently of the Act. The plaintiff has not pleaded any such case, and we have already held that it must be pleaded, as indeed was the case under the old law. (4)

But in my opinion, speaking for myself alone, on the facts of this case, no other plea was open to the plaintiff. The Prescription Act made straight the path of the owner of the dominant tenement by putting him to prove actual enjoyment for twenty years only and dispensing with all questions of right and of the title to the servient tenement, but it gave to the latter two defences—(1.) the agreement mentioned in s. 3; and (2.) the obstruction, &c., mentioned in s. 4. In cases in which either of these defences is applicable, the plaintiff cannot evade the Act by setting up any mode of claim other than that conferred on him by the statute. This is the meaning, in my opinion, of *Tapling* v. *Jones* (5), where the head-note is perhaps stated in too general terms. "The right to ancient lights now depends on statute (2 & 3 Will. 4, c. 71), and so does not require, and ought not to be rested on, any prescription or fiction of a license. Therefore, as the statute declares it to be absolute and

(1) 2 J. & H. 555.
(2) L. R. 6 Ch. 763.
(3) L. R. 10 Ch. 283.
(4) See Bullen and Leake's Precedents, 2nd ed. p. 684.
(5) 11 H. L. C. 290.

indefeasible, it cannot be lost by a temporary intermission not amounting to abandonment, nor can it be forfeited by any attempt to extend the right." Lord Westbury says (1): "Upon this section it is material to observe, with reference to the present appeal, that the right to what is called an ancient light now depends upon positive enactment. It is a matter juris positivi, and does not require, and therefore ought not to be rested on any presumption of grant or fiction of a license having been obtained from the adjoining proprietor. Written consent or agreement may be used for the purpose of accounting for the enjoyment of the servitude, and thereby preventing the title which would otherwise arise from uninterrupted user or possession during the requisite period. This observation is material, because I think it will be found that error in some decided cases has arisen from the fact of the Courts treating the right as originating in a presumed grant or license." And Lord Cranworth says (2): "The right to enjoy light through a window looking on a neighbour's land, on whatever foundation it might have rested previously to the passing of 2 & 3 Will, 4. c. 71, depends now on the provisions of that statute."

Take, for instance, the plea of lost grant; Lord Chelmsford says: (3) "Where there had been an uninterrupted use of lights for twenty years, it was to be presumed that there was some grant of them by the neighbouring owner. . . . . The Prescription Act turned this presumption into an absolute right." It is plain, therefore, that a plaintiff could not evade the defences given by ss. 3 and 4 of the Act by pleading lost grant instead of the Act, and Lord Chelmsford evidently regarded the older presumption as merged in the new statutory right. It is impossible for any Court to disregard these judgments, which are of the highest authority. But in a case in which there is no express defence provided by the Act for the servient tenement, the right may still be claimed on any ground available before the Act; thus the Act says nothing about unity of title, or unity of possession, and it is therefore open to the plaintiff to plead his enjoyment from time immemorial, when the unity of

(1) 11 H. L. C. 304. (2) 11 H. L. C. 310.
(3) 11 H. L. C. 318.

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possession or title is the only bar to his plea under the Act, as he did in *Aynsley* v. *Glover* (1); and Mellish L.J. in his dictum says (2): "It is every-day practice to plead, 1, enjoyment for twenty years before action; 2, enjoyment for forty years before action; 3, enjoyment from time immemorial; 4, a lost grant; and it has always been understood that a right may be supported on the third ground, although it may be incapable of being supported under the first or second. There are no negative words in the statute to take away rights existing independently of it."

His statement is quite consistent with this view of *Tapling* v. *Jones* (3) (which he cites in his judgment). The Lord Justice specifies the third plea only as capable of being supported, although the first and second could not, and he says that "rights existing independently of the statute" (i.e., rights that have not merged into the statutory rights) "are not taken away by the statute"; and he means, in my opinion, those rights, and those rights only, notwithstanding the dictum of Stirling J. in *Smith* v. *Baxter*. (4) With the greatest respect I think that he has overlooked the limited nature of Mellish L.J.'s dictum; nor do I think that Lord Blackburn in *Dalton* v. *Angus* (5) meant to do more than adopt what Mellish L.J. had said, and *Tapling* v. *Jones* (3) was not cited in *Dalton* v. *Angus*. (5)

It is not necessary to consider what the effect of the letter of January 18, 1899, would be independently of the Act, but I think it clear that it is competent for the tenant in occupation of the dominant tenement to give the consent or agreement mentioned in s. 3. The right to light thereunder is acquired by actual enjoyment; such enjoyment is that of the tenant in possession, or, if the house is vacant, that of the owner who has possession in law. It follows that the person who by his enjoyment creates the right to light can limit the character of such enjoyment so as to avoid any such creation. The section is founded on acts de facto, as distinguished from de jure, and it is well settled in the converse case that the tenant of the servient

(1) L. R. 10 Ch. 283.
(2) Ibid. 284.
(3) 11 H. L. C. 290.
(4) [1900] 2 Ch. 138, 146.
(5) 6 App. Cas. 814.

tenement can by his acquiescence allow the creation of the easement over his landlord's land, and cannot in the absence of express agreement be compelled to take, or to allow any steps to be taken, to prevent it. Rights under this section are acquired or lost, as the case may be, by virtue of the acts or acquiescence of the occupier, not by virtue of his title, and the acts or the acquiescence of a disseisor during his occupation of the premises are as effectual as those of an owner in fee. I do not, of course, mean that the writing under s. 3 can be given by any one found on the premises. The Court must be satisfied that such person is the occupier in enjoyment of the light. A mere casual occupant, such as a visitor, guest, lodger or servant residing in the house, or a caretaker of an empty house, or employees at a workshop, cannot give any such document; their occupation and enjoyment is by leave and licence of the master of the house or workshop, and is in truth his occupation and enjoyment.

I agree that this appeal fails.

Solicitors: *Colyer & Colyer; W. B. Styer.*

W. C. D.

JOYCE J.
1907
Nov. 7, 12.

In re BOUCHERETT.
BARNE *v.* ERSKINE.

[1907 B. 2612.]

Trustee — Appointment of New Trustees — "Acting Executor of the last surviving Trustee"—"Personal Representative"—Appointment by One of Three Executors, the other Two not having proved—Lord Cranworth's Act, 1860 (23 & 24 *Vict. c.* 145), *s.* 27—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vct. c.* 41), *ss.* 31, 71—*Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 10—*Court of Probate Act*, 1858 (21 & 22 *Vict. c.* 95), *s.* 16.

H. R. B., by his will dated in 1875, devised his real estate to trustees to certain uses. The will contained no power of appointing new trustees, but in effect referred to the powers given by Lord Cranworth's Act. H R. B. died in 1877. The last surviving trustee died in 1888, having by his will appointed three executors. Probate was granted to one only, power to prove being reserved to the other two. In 1894 the proving executor, in exercise of the power given to him by the Trustee Act, 1893, and of every other power enabling him, appointed new trustees of H. R. B.'s will. The other two executors were alive at the date of this appointment, but died without having taken probate:—

Held that, having regard to the saving clause in s. 71 of the Conveyancing Act, 1881, the appointment was good as having been made by the "acting executor" of the last surviving trustee within s. 27 of Lord Cranworth's Act.

In re Solomon and Meagher's Contract, (1889) 40 Ch. D. 508, and *In re Walker and Hughes' Contract*, (1883) 24 Ch. D. 698, followed.

Semble also, that it was good, on the ground that under s. 16 of the Court of Probate Act, 1858, the two co-executors having died without proving the will, the representation to the testator had gone and devolved as if they had not been appointed executors.

Adjourned Summons.

H. R. Boucherett, by his will dated March 25, 1875, devised his real estate to trustees to certain uses in strict settlement, under which the plaintiff was now tenant for life in possession. The testator also bequeathed certain articles to his said trustees upon trust to permit the same to devolve as heirlooms with his real estate, and he conferred upon his trustees the usual powers of sale of his estates, with the consent of the adult beneficiary in possession for the time being. The will

contained no express power of appointing new trustees, but contained the usual clause supplementing the statutory powers given by Lord Cranworth's Act.

The testator died on June 8, 1877. The last surviving trustee of the will died on September 17, 1888, having by his will, dated September 20, 1877, appointed Frederick Bowker, Frederick Peake, and Mary Williamson to be his executors, and his will was on July 5, 1889, proved by Frederick Bowker alone, power being reserved to Frederick Peake and Mary Williamson to prove, which they never exercised. By an indenture dated November 16, 1894, Frederick Bowker, in exercise of the power for that purpose given to him as the personal representative of the last surviving trustee by the Trustee Act, 1893, and of every other power enabling him, appointed C. C. Sibthorp and E. Turnor to be trustees of the will of the testator. At the date of this appointment Frederick Peake and Mary Williamson were both alive, but they subsequently died without having taken probate. E. Turnor died on December 15, 1903. By another indenture dated January 16, 1906, C. C. Sibthorp appointed the defendants J. F. Erskine and Michael Barne to be trustees of the said will in the place of E. Turnor and himself, who was desirous of retiring from the trusts thereof. An order for the sale of some of the heirlooms had been made by Kekewich J., and the plaintiff, as tenant for life in possession, had contracted under the powers of the Settled Land Acts to sell a portion of the settled estates.

The purchaser having raised the question whether the defendants J. F. Erskine and Michael Barne were duly appointed trustees of the said will, having regard to the fact that both Frederick Peake and Mary Williamson were alive at the date of the appointment of November 16, 1894, and had not renounced probate, though probate had not been actually granted to them, an originating summons was taken out by the plaintiff to have it declared that by the indenture of November 16, 1894, C. C. Sibthorp and E. Turnor were duly appointed trustees of the said will, and that by the indenture of January 16, 1906, the defendants J. F. Erskine and Michael Barne were the duly appointed trustees of the said will.

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F. E. Farrer, for the applicant. Under s. 27 of Lord Cranworth's Act the power of appointing new trustees was under such circumstances as existed in the present case vested in the acting executors, or executor or administrators or administrator, of the last surviving trustee. The expression "acting executor" in that section has always been understood to mean the "sole proving executor": Lewin on Trusts, 11th ed. p. 786, note (*d*).

That section was repealed by the Conveyancing Act, 1881, s. 71, the preamble of which Act calls it an Act for simplifying and improving the practice of conveyancing; and in the substituted section (s. 31) the words "personal representatives" replace the expression "acting executors." The same words are used in s. 10 of the Trustee Act, 1893, by s. 51 of which Act s. 31 of the Conveyancing Act, 1881, was repealed. In *In re Parker's Trusts* (1) it was held that the general executors of a sole surviving trustee were entitled to appoint. The real point there decided was that, as the general executors had appointed before the special executors had proved, the appointment was good. *In re Pawley and London and Provincial Bank* (2), which was a decision on the Land Transfer Act, may be distinguished on the ground that "personal representative" is defined to mean an executor; and words in the singular include the plural: Interpretation Act, 1889 (52 & 53 Vict. c. 63). Any other construction would involve continual applications to the Court to appoint new trustees.

Bryan Farrer, for the new trustees. This appointment would have been good under Lord Cranworth's Act. In s. 71 of the Conveyancing Act, 1881, which repeals Lord Cranworth's Act, there is a saving clause (sub-s. 2). Sect. 31, which replaces s. 27 of Lord Cranworth's Act, is in its turn repealed by s. 51 of the Trustee Act, 1893; but that does not affect s. 71, which contains the saving clause. The principle which governs this case is shewn in *In re R.* (3) The appointment by Frederick Bowker in 1894 was perfectly good.

Howard Wright, for the persons entitled in remainder. The only question is as to the meaning of the expression "personal representative for the time being of the last surviving trustee."

(1) [1894] 1 Ch. 707. (2) [1900] 1 Ch. 58.
(3) [1906] 1 Ch. 730.

The material date is that of the execution of the appointment. The Trustee Act, 1893, is one of a chain of Acts in which the expression occurs.

The expression "personal representatives" prima facie means the executors named in the will, although they may not have taken out probate: *Ex parte Winter* (1); *In re Ellis' Settlement* (2); *In re Trubee's Trusts* (3); *In re Price's Settlement.* (4) This case cannot be distinguished from *In re Pawley and London and Provincial Bank.* (5) *In re Parker's Trusts* (6) was a very special case, and does not conclude the present case. The expressions "personal representatives" and "legal personal representatives" used in the Trustee Acts mean all the executors, and not only those who have proved. The appointment by Frederick Bowker was therefore not valid.

F. E. Farrer, in reply, referred to *Earl Granville* v. *M'Neile* (7); Lewin on Trusts, 11th ed. p. 798 (*f*).

Cur. adv. vult.

Nov. 12. JOYCE J. The question in this case is whether an appointment of new trustees of the will of the testator H. R. Boucherett, made by the proving executor of the last surviving trustee of the will, is valid or otherwise.

The testator died on June 8, 1877, his will being dated March 25, 1875. That will contained no power for the appointment of new trustees, but towards the end of it there is this declaration: "That upon any appointment of a new trustee or new trustees under this my will the number of trustees may be augmented or reduced but not to less than two"; and so on. That is, or rather was, the ordinary mode of supplementing the provisions of Lord Cranworth's Act with reference to the appointment of new trustees when, as here, there is no other person nominated by the will for the purpose of making such appointment. I need only refer to the 4th vol. of Davidson's Precedents, 2nd ed. pp. 77-8, 453, and 581, and also the 3rd vol. 3rd ed. p. 228.

(1) (1828) 5 Russ. 284.
(2) (1857) 24 Beav. 426.
(3) [1892] 3 Ch. 55.
(4) [1883] W. N. 202.
(5) [1900] 1 Ch. 58.
(6) [1894] 1 Ch. 707
(7) (1849) 7 Hare, 156.

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There was therefore in the will what the text-books call, not perhaps quite correctly, an implied incorporation of the provisions of Lord Cranworth's Act, and by reason of the existence of this statute down to the passing of the Conveyancing Act, 1881, such an appointment as that now in question could validly have been made, for the will, having regard to the provision of Lord Cranworth's Act, operated to authorize such an appointment.

Then comes the Conveyancing Act, 1881, which repealed Lord Cranworth's Act in part—that is to say, it repealed the sections containing the power of appointing new trustees. But there is a saving clause in s. 71, which, so far as material, is to the effect that the repeal by the Act of any enactment should not affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of the Act. Upon that it is plain that the powers of Lord Cranworth's Act, as incorporated by implication, if that be the correct expression, in this will, were not destroyed by the Conveyancing Act, 1881. It has been so expressly decided by North J. in *In re Solomon and Meagher's Contract* (1), and, so far as I know, never doubted: see also *In re Walker and Hughes' Contract.* (2) With both those decisions, if I may respectfully say so, I entirely agree. The effect is to my mind—and I do not feel any doubt about it—that the saving clause in s. 71 of the Conveyancing Act, 1881, leaves in operation the power in Lord Cranworth's Act in cases where it was incorporated, either expressly or by implication, in previous instruments. Consequently in my opinion the appointment in question in this case was perfectly good.

I also think it was good on another ground. Although it does not appear to be in evidence, it was stated to me that the two other executors who were living at the date of the appointment died without proving the will; therefore it is clear that under s. 16 of the Court of Probate Act, 1858, the representation to the testator goes and devolves in the same manner as if those persons to whom power to prove was reserved had never been appointed executors of the will, they having died without proving. I agree

(1) 40 Ch. D. 508. (2) 24 Ch. D. 698.

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that there is a difficulty in that, because the words of the section are not "shall be considered to have gone and devolved," but "shall go and devolve." But upon consideration I am of opinion that this makes no difference. So upon that ground also I think this appointment is perfectly good; at any rate, I am perfectly certain that it is good upon the first ground.

Solicitors: *Farrer & Co.*

G. A. S.

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Oct. 18; *Nov.* 20.

In re BROCKET.
DAWES *v.* MILLER.

[1907 B. 1262.]

Will—Construction—Specific Devise—Complete general Description—Subsequent imperfect Examination—Falsa demonstratio.

The testatrix, by her will dated in 1888, devised the real estate to which she became entitled under a codicil to her father's will, "namely, the residence known as Orford House, in the parish of Oakley, in the county of Essex, and lands and hereditaments" (in certain parishes) "in the same county" to her sister for life, with remainder over, and she then disposed of her residue. In addition to the real estate specifically named by the testatrix as passing to her under the father's codicil, there was, in fact, a freehold in London, to which she was also thus entitled. There was no evidence whether she knew that it formed part of the property passing under the codicil:—

Held, that the specification by name and locality introduced by the word "namely" was not merely an imperfect enumeration of the properties intended to be devised, but formed the leading description, and consequently that the freehold in London did not pass by the specific devise, but fell into residue.

West v. *Lawday*, (1865) 11 H. L. C. 375, considered.

ELIZABETH BROCKET, by her will dated August 14, 1888, devised "the real estate to which I under the codicil to the will of my late father Stanes Brocket Brocket Esq. became entitled upon the death of Sarah Chamberlayne widow of my late uncle General Chamberlayne deceased, namely, the residence known as Orford House in the parish of Oakley in the said county of Essex and

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lands and hereditaments in the parishes of Oakley, Stanstead, Montfitchett and Henham in the same county to my sister Mary Meryon and her assigns for her life without impeachment of waste with remainder to Maria Hamerton" absolutely. The testatrix, after making certain other specific devises and bequests, gave the residue of her real and personal estate to trustees upon trust for sale and to pay the income to Mrs. Meryon for life, and after her decease for W. T. F. Chamberlayne absolutely.

The testatrix died on April 25, 1895.

In or about 1900 it was discovered for the first time that certain freehold hereditaments known as No. 1, Hare Court, Temple, formed part of the property which belonged to General Chamberlayne, and so passed under the codicil to the will of Stanes Brocket Brocket to the testatrix.

In 1898 No. 1, Hare Court was sold by the trustees, and the proceeds of sale were invested, and the income arising therefrom was paid to Mrs. Meryon (afterwards Brocket) during her life.

Upon her death the question arose whether No. 1, Hare Court passed under the specific devise in the will of the testatrix, together with Orford House and the other properties enumerated, or whether it passed under the residuary devise to W. T. F. Chamberlayne.

This was an originating summons taken out by the trustees for the purpose of determining that question.

There was no evidence whether the testatrix knew that No. 1, Hare Court formed part of the property to which she became entitled under the codicil to her father's will.

Sebastian, for the trustees.

Rolt, for Maria Hamerton (now Mrs. Miller). No doubt where a gift in a will contains one entire description of the subject of the gift a part of that description cannot be rejected: *West* v. *Lawday*. (1) This case does not fall within that decision; but in *West* v. *Lawday* (1) Lord Westbury (2) lays down the principle which does govern this case, namely, that where there is a gift of

(1) 11 H. L. C. 375. (2) 11 H. L. C. 384.

an entirety expressly and definitely given, it shall not be prejudiced by the addition of an imperfect and inaccurate enumeration of the particulars of the specific gift. Where a testator uses two distinct descriptions, of which the first is complete and correct and the second incomplete and erroneous, the maxim "Falsa demonstratio non nocet" applies, and the incomplete description will not operate to cut down the gift: *White* v. *Birch*. (1) In this case there is first a complete general description of the property comprised in the gift, followed by an imperfect enumeration. The latter cannot be read as restricting the former: *Travers* v. *Blundell*. (2) The first part of the gift forms the leading description. [He also referred to *Webber* v. *Stanley* (3); *In re Seal*. (4)]

Vaughan Hawkins, for W. T. F. Chamberlayne. In this case the maxim "Falsa demonstratio" does not apply. It is a composite gift, and a part of it cannot be rejected. Every word in the will must, if possible, be given effect to. The testatrix has put her own interpretation upon what she intended to give. The first part of the gift does not constitute the leading description. The word "namely" connecting the two parts of the description is equivalent to "by that I mean." The second part of the gift cannot be cut out altogether. The rule which it is suggested was laid down by Lord Westbury in *West* v. *Lawday* (5) does not apply to this case.

Travers v. *Blundell* (2) was a very peculiar case, and does not throw any light upon that now under discussion. The discovery as to No. 1, Hare Court does not affect the construction of the will. That property falls into residue. [He also referred to *Anstee* v. *Nelms* (6); *Ricketts* v. *Turquand*. (7)]

Rolt, in reply.

Cur. adv. vult.

Nov. 20. JOYCE J. The devise in question in this case is contained in the will dated August 14, 1888, of a testatrix who died in April, 1895. It is in the following terms: "I devise the

(1) (1867) 36 L. J. (Ch.) 174.
(2) (1877) 6 Ch. D. 436.
(3) (1864) 16 C. B. (N.S.) 698.
(4) [1894] 1 Ch. 316.
(5) 11 H. L. C. 375.
(6) (1856) 1 H. & N. 225.
(7) (1848) 1 H. L. C. 472.

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real estate to which I under the codicil to the will of my late father Stanes Brocket Brocket Esq. became entitled upon the death of Sarah Chamberlayne widow of my late uncle General Chamberlayne deceased, namely, the residence known as Orford House in the parish of Oakley in the said county of Essex and lands and hereditaments in the parishes of Oakley, Stanstead, Montfitchett and Henham in the same county to my sister Mary Meryon," and so on, for life with remainder over; and there was a residuary devise to the same lady, Mary Meryon, for life, with a different remainder over.

The tenant for life under the specific as well as under the residuary devise died in December, 1906. Then it appeared as a matter of fact that, besides the property in Essex specifically described, there was another property, No. 1, Hare Court, to which the testatrix became entitled under the codicil of her father as in her will mentioned, and the question now is whether the property No. 1, Hare Court passed under this specific devise with the Essex property, or whether it was left to pass under the residuary devise.

Now in *Travers* v. *Blundell* (1) the testator by his will appointed all that part and parts of the property comprised in and devised by the thereinbefore recited will of his late father, "as is and are therein described as that part of Rigby's estate purchased by my said father, situate as aforesaid, consisting of Limekiln Meadow, Kitchen Pasture, Fingerpost Meadow and Middle Meadow, with the timber growing thereon," but without the minerals. But what was described in the father's will was "all that part of Rigby's estate purchased by me situate as aforesaid consisting of Limekiln Meadow, Fingerpost Meadow, Kitchen Pasture, Great Pasture Field, Billing's Meadow, and Middle Meadow," there being only four of these fields specified in the testator's will. Sir George Jessel said (2): "The question is, which is the leading description? The gift is of that part purchased by the father, and the 'consisting of' is not an accurate description of what it consists. Indeed the same remark would have been made if it had been a recital. It appears to me the leading description is, 'that part of Rigby's estate

(1) 6 Ch. D. 436. (2) 6 Ch. D. 441.

purchased by the father.' It is a question on which very little can be said, for, as I said before, it is rather the impression of the judge on reading the words knowing the facts than anything else, the principle of law being to construe the words, having regard, as far as you can, to the whole facts"; and it was held that all six fields, not merely the four, passed by the appointment, and this decision was confirmed by the Court of Appeal. I should say that in that case there probably was a blunder in the actual drafting of the will, or rather in the copying from the will of the father; but, when carefully considered, I think there can hardly be a serious doubt as to what the testator, that is the appointor, really intended.

In a previous case of *Hardwick* v. *Hardwick* (1) there was a devise "of all that my share and interest in the messuages, lands, and premises called or known by the name of the Dyffrydd and the Little Dyffrydd, situate in the parish of Kinnerley, in the county of Salop, now in the occupation of John Edwards." It appeared that the lands known as Dyffrydd included two small closes in the parish of Llandisilio but only accessible from the rest of the lands, which were in the parish of Kinnerley; also one close formerly in the same occupation as the other land, but at the date of the will and the death of the testatrix occupied by somebody else. Now this was a case in which there had been a complete description of the thing intended to be given by name, and a subsequent misdescription as to some particular connected with it. Lord Selborne says (2): "These are cases of great nicety, and I should not at all dispute the principle laid down in *Webber* v. *Stanley* (3), nor the maxim which Mr. Cookson has cited. It is perfectly certain that if all the terms of description fit some particular property, you cannot enlarge them by extrinsic evidence so as to include anything which any part of those terms does not accurately fit. On the other hand, I apprehend that if the words of description when examined do not fit with accuracy, and if there must be some modification of some part of them in order to place a sensible construction on the will, then the

(1) (1873) L. R. 16 Eq. 168. (2) L. R. 16 Eq. 175.
(3) 16 C. B. (N.S.) 698.

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whole thing must be looked at fairly in order to see what are the leading words of description, and what is the subordinate matter, and for this purpose evidence of extrinsic facts may be regarded."

The maxim which Lord Selborne referred to was "Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram"; and that was explained by Alderson B. in *Morrell* v. *Fisher* (1) in this way: "The rule means that if it stands doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, there is some land wherein all the demonstrations are true, and some wherein part are true and part false, they shall be intended words of true limitation, to pass only those lands wherein the circumstances are true." I say that is the explanation of Alderson B., and I think it is so printed in the original report, but they are really the words of Lord Bacon in discussing his thirteenth maxim; at least, that is how I understand it.

Now the present is not a case in which there has been a complete description of the thing intended to be given by name with a subsequent misdescription as to some particular connected with it; but in the present case we have two perfectly distinct descriptions of the subject-matter of the gift, each complete in itself, and they are connected by the adverb "namely," which means "by name" or "that is to say"; and there is no other connection between the two descriptions. The first description is a general collective description, and in this sense uncertain, that inquiry and investigation, with, I suppose, some possibility of error, are necessary to ascertain the particulars of the real estate referred to. The second description is more definite and specific. It is by name and locality, and an absolutely certain and complete description on the face of it, as to the meaning of which no possible question, as far as I am aware, can arise if —as I think we must—we understand that by the lands and hereditaments in the parishes of Oakley, Stanstead, Montfitchett and Henham, in the same county, it is only the

(1) (1849) 4 Ex. 591, 604.

testatrix's lands in that county that are referred to. Then the obvious question at once occurs to one's mind, why, as here, is a second description added if it be not to make certain what was more or less obscure before, and to prevent any error or misunderstanding?

What, however, are the extrinsic facts in this case? The will was, no doubt, prepared by a lawyer. It is not suggested that there was anything in the natural fitness of things to make one expect that the property in Hare Court should be comprised in either one of the two devises in preference to the other, or why Hare Court and the Essex property, which of course are far apart, should go together.

Again, in the present case, unlike many others, there is no reason, I think, to suppose any blunder in the mere drafting or copying of any part of the draft or engrossment of the will. It seems probable that the draftsman understood, and the testatrix thought and believed, if she thought anything about this particular property of Hare Court at all, that the second description by name and locality did comprise and include all the real estate she derived or to which she became entitled under the codicil she mentions, and if they actually thought about Hare Court at all they thought, I suppose, that it was not part of the real estate devised by the codicil. Well, if that be so, there could hardly have been any actual intention to devise No. 1, Hare Court by the first or general description.

As a matter of fact there is no evidence to shew that the testatrix knew whether No. 1, Hare Court was comprised or not in the general description, or even knew of the Hare Court property at all. The affidavit which states that in or about the year 1900 it was discovered for the first time that certain freehold premises situate and known as No. 1, Hare Court, Temple, formed part of the property which belonged to General Chamberlayne, and so on, rather suggests that nobody's attention was directed to this matter at all before the date referred to. What the testatrix would have done if she had thought about Hare Court at all, and had clearly understood that it was part of the real estate which she derived under the particular codicil, we have no means of determining except by reference to the will.

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We have the will, and nothing but the will, from which to determine what was the intention of the testatrix or to guide us in the matter. If what the testatrix intended to devise was only the property specified by name and locality, then the first general description is inaccurate. If what was thereby meant was all the real estate which she derived under that codicil, whatever it might be, and if what she meant to devise was all the real estate devised under that codicil, whatever it might be, then as it turns out the specification by name and locality is an incomplete specification in omitting No. 1, Hare Court.

Counsel for the persons interested under this specific devise, in addition to the case of *Travers* v. *Blundell* (1), which I have already mentioned, and which was, I think, really very different from the present case, cited *Webber* v. *Stanley* (2) and *White* v. *Birch*. (3) *Webber* v. *Stanley* (2) is a long case, and the marginal note is very long. I think I need not read it through, but, when examined, it is not, I think, so closely analogous to the present case as to be of much assistance; at all events, I think it does not help the contention of the persons claiming under this specific devise. In the devise in *Webber* v. *Stanley* (2) the words "in the county of Hants," in my opinion, clearly governed, and, if it is necessary to say so, clearly qualified, the whole gift, so that nothing outside that county could pass by the devise, and it was so held. In *White* v. *Birch* (3) the testator devised all his freehold lands, buildings, tenements and hereditaments situate at or near Red Hall, in the parish of Halesowen, and then in his own occupation. The testator had just given up occupying all but three acres out of 200 which was the extent of his land at Red Hall, and at the date of the will there were no buildings at all upon the three acres. The Vice-Chancellor held that there was no doubt as to the testator's intention, and that the misdescription as to the property being in his own occupation did not vitiate the gift. This, again, was a case like *Hardwick* v. *Hardwick* (4), where, it being pretty plain what was really intended to be given, there was a subsequent misdescription in reference to some particular such as occupation or the like.

(1) 6 Ch. D. 436.
(2) 16 C. B. (N.S.) 698.
(3) 36 L. J. (Ch.) 174.
(4) L. R. 16 Eq. 168.

But it was principally upon a passage from the judgment of Lord Westbury in *West* v. *Lawday* (1) that reliance was placed by counsel arguing in favour of the persons claiming under the specific devise. In that case the particular passage of the will in question was, "Being possessed of a lease for lives renewable for ever of certain lands in the county of Kerry which said lands are denominated B. C. and F. all situate in the parish of Adahoe in the county of Kerry, I do therefore require that the aforesaid lands should, as soon after my decease as possible, be sold," and so on. It appeared that in the same lease were included not only the lands denominated B. C. and F., but also lands called Groyne; and it was held that the lands called Groyne did not pass by the devise, and that the words which were alleged to be an imperfect enumeration did in fact limit the gift. The first paragraph of the marginal note is: "Where some subject-matter is devised as a whole, and then words of description are added which do not completely exhaust all the particulars included in the general devise, but seem to limit and restrict it, the entirety, expressly and definitely given, shall not be prejudiced by the imperfect enumeration of particulars"; and then it goes on, "nor shall a clear enumeration of particulars be overruled by an apparently general devise." But I am bound to say that I cannot find in the judgment of any of the learned Lords any statement to that effect. However, it is in the marginal note, and it is no doubt true. I have not been able to find any other report of the case. Lord Wensleydale interrupted the argument, saying (2): "The lands are not merely referred to, but named. Can any other pass but those which are so named?" And the Lord Chancellor said: "Suppose I had one lease of six houses, three in Grosvenor Square and three in Belgrave Square, and I devised 'all my houses in such lease,' and then named the three houses in Berkeley (3) Square, would all the six pass?" In the judgment of Lord Westbury, however, we find the following passage(4): "That being the state of the case, and that being the plain and obvious meaning of the words, it is by the ingenuity of counsel that we have been involved in this kind of difficulty; that

(1) 11 H. L. C. 375.
(2) 11 H. L. C. 379.
(3) *Sic.*
(4) 11 H. L. C. 383.

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these words, 'which said lands are denominated' so and so, are altogether erroneous, and that the testator used them under a mistake. And accordingly they desire your Lordships to regard these words as coming under the ordinary maxim of 'Falsa demonstratio' (that being the sort of technical reference to the rule that is referred to), and they desire your Lordships to accept the words as an imperfect enumeration of the lands that were intended to be described. It would be impossible to do so without violating a cardinal principle of language, and saying that when words, according to their ordinary and grammatical and obvious and natural sense and meaning, have a clear and unambiguous interpretation, that meaning ought to be done away with in order to substitute for it another meaning." And, as I have said before, the decision was that the lands called Groyne, not being named, did not pass. Now the maxim referred to, fully stated, is of course "Falsa demonstratio non nocet cum de corpore constat," the last four words being, of course, very important. Another version of the maxim is "Nil facit error nominis cum de corpore vel persona constat." Lord Esher used to say that he detested any attempt to fetter the law by maxims, for, as he said, they are almost invariably misleading, being for the most part so large and general in their language that they always include something which really is not intended to be included in them. And no doubt they are not to be treated as articles of a code, or as enactments contained in a statute. But the maxims I have mentioned really, I think, only come to this, that a false description of a person or thing will not vitiate a gift in a deed or will if it be sufficiently clear what person or thing was really meant. This cannot be determined without reading and considering all the terms of the will.

In *West* v. *Lawday* (1) Lord Westbury proceeds further to say—it is in the very next paragraph (2): "It is altogether a mistake to suppose that the language of this will"—he is speaking of the will, of course, in *West* v. *Lawday* (1)—"is capable of being brought within the range of that maxim. That maxim to which I refer is applicable to a case where some subject-matter is devised as a whole under a denomination which is applicable to the entire land,

(1) 11 H. L. C. 375. (2) 11 H. L. C. 384.

and then the words of description that include and denote the entire subject-matter are followed by words which are added on the principle of enumeration, but do not completely enumerate and exhaust all the particulars which are comprehended and included within the antecedent, universal, or generic denomination. Then the ordinary principle and rule of law, which is perfectly consistent with common sense and reason, is this: that the entirety which has been expressly and definitely given shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of the specific gift." Now, notwithstanding this, I think I may say that there is certainly no rule that in a will where there are two complete descriptions the former shall prevail over the latter; and I cannot think that Lord Westbury meant to lay down positively that in a will where you have once got a complete description of a subject-matter in general and collective terms every or any subsequent enumeration of particulars must necessarily be rejected if it do not include each and every item of the particulars which would be included in the first or general designation standing by itself. Obviously, I think, much must or may depend upon the terms in which the enumeration of the particulars is introduced. It may be introduced in such a way as to shew that what the testator was doing was, in Lord Westbury's own words (1), to use words plainly meant to substitute a definite and precise statement for an antecedent generality. Supposing in the present case the testatrix instead of the word "namely" had made use of the expression "what I mean is," the enumeration following by name and locality must then, I think, necessarily have been read as explanatory, and if required as restrictive, of the prior general description. For instance, in the case of *Barton* v. *Dawes* (2) there was a conveyance of all that messuage or farm-house, closes of land, and so on, called Gotton Farm in the occupation of J. S., and containing and consisting of the several particulars specified in the first division of a schedule thereunder and more particularly delineated in a map, and it turned out that there was a piece of land, part of the farm, which was not included in the schedule or plan, though part of the farm, and

(1) 11 H. L. C. 382. (2) (1850) 10 C. B. 261.

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so occupied. It was held that what was not included in the schedule did not pass. In *Griffiths* v. *Penson* (1), which is a decision of Pollock C.B. in the Court of Exchequer, there was a conveyance by a deed of all that messuage with the land, &c., belonging, late in the occupation of Barrett, and which house and lands are called by the names following, naming the greater part but not all the closes whereof the farm consisted, and the conveyance was held to pass only the closes expressly named, and not the residue also. Numerous other cases to the same effect are to be found in Norton on Deeds at p. 210 and the following pages. It is quite clear, to my mind, that if there be a conveyance of real estate described in general terms followed by a definite and specific enumeration of particulars, as by schedule with or without plan, which enumeration omits something which might otherwise have been covered by the general description, then, generally speaking, the designation by schedule and plan would not be read as an imperfect enumeration to be disregarded as "Falsa demonstratio," but as restrictive of the prior general description. So I think in a will, if there be not a schedule and plan, but an equivalent specific enumeration of particulars by name and locality, that specific enumeration must be held to limit and restrict what has gone before. Suppose the specification in the testatrix's will in this case had included by name, locality, and unmistakable description some real estate which the testatrix had not derived under the codicil of her father, would not that have passed? And suppose, as was suggested by Lord Cranworth, I think, in the case of *West* v. *Lawday* (2), that what I call here the specification by name and locality had included No. 1, Hare Court only, could it possibly have been held that all those lands in the county of Essex passed by the devise?

Upon the whole I have come to the conclusion that the specification here by name and locality introduced by the word "namely" is analogous and equivalent to a specification in a conveyance by schedule, or schedule and plan, and is not merely an imperfect enumeration of the properties intended to be devised. In other words, I think that the specification by name and locality, which is free from all ambiguity, forms the leading

(1) (1863) 9 Jur. (N.S.) 385. (2) 11 H. L. C. 375.

description, and that No. 1, Hare Court did not pass by the specific devise in question; and I think that is what the testatrix really intended.

Solicitors: *Kingsford, Dorman & Co., for Dawes, Son & Prentice, Rye; Beachcroft, Thompson & Co.*

G. A. S.

In re UNITED STATES PLAYING CARD COMPANY'S APPLICATION.

Trade Mark—Design—Registration as Trade Mark—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 3, 8, 9.

The mere fact that a proposed trade mark is capable of being registered as a design is not a fatal objection to its registration as a trade mark.

MOTION.

On November 13, 1906, the applicants filed an application, No. 287,859, for registration of a trade mark in class 39 in respect of playing cards. The proposed trade mark consisted of a pattern on the back of the cards. There was a toothed wheel containing a foliate cross in the centre of the card, and a circle, containing a mounted bicyclist, in each corner, with other conventional ornamentation.

On June 19, 1907, the registrar refused the application, and on July 18, 1907, he stated the grounds of his decision as follows:—

"This refers to an application by the United States Playing Card Company, of Cincinnati, United States of America, for the registration of a mark in class 39 in respect of playing cards. The application was refused under s. 9 of the statute, and also on account of the prior pending application by Messrs. Charles Goodall & Sons, Limited, of Camden Works, 24, Great College Street, Camden Town, for the registration of the word 'bicycle' in this class, also in respect of playing cards (283,741). This latter application was opposed by the present applicants, and ultimately their opposition prevailed and led to the withdrawal

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of that application. While the initial difficulty has now been cleared out of the way, it remains for me to consider whether the application is one that I ought to entertain under the Trade Marks Act at all. It is of importance, in my view, to keep more or less strictly separated the classes of industrial property which we deal with in separate parts of the Act of 1883. The application here is to register as a trade mark for playing cards a pattern on the back of such playing cards. In my view that pattern, if it is to be protected at all, must be registered under the Designs section. I need not deal with the question whether any artistic copyright could also be obtained for it. The back of a playing card is not usually the place where one expects to find the trade mark of the person who makes those cards. It is adapted for the purpose of decorating the cards only, and if every person who designs patterns for playing cards is entitled to register those patterns as trade marks, we shall at once have a very large extension of the period of protection of designs for the backs of playing cards. I do not think this would be right, and I certainly do not suppose that any person buying a pack of playing cards would desire to have the back covered with advertising or trade mark matter. It is sometimes the practice to put the trade mark on the ace of spades, and it does not usually appear on the cards anywhere else. Frequently it is outside the pack of cards altogether—on a label covering them. Persons do not expect to find the trade mark on the backs of the cards, and would not consider the back of a card as being the proper place for the trade mark or look for it there. In my view this card back is a design and not a trade mark, and cannot be protected as such."

The applicants brought this motion by way of appeal against the registrar's refusal, and asked for an order that he should proceed with the registration.

Walter, *K.C.*, and *Kerly*, for the applicants. The registrar's decision is appealable under s. 12, sub-s. 3, of the Trade Marks Act, 1905. He has not gone into the merits, but has refused the application on a preliminary point, namely, that a design cannot be registered as a trade mark. That view is not well founded.

Sect. 3 of the Trade Marks Act, 1905, provides that "A 'mark' shall include a device . . . . A 'trade mark' shall mean a mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale: A 'registrable trade mark' shall mean a trade mark which is capable of registration under the provisions of this Act:" Sect. 8 provides that "A trade mark must be registered in respect of particular goods or classes of goods." Sect. 9 provides that "A registrable trade mark must contain or consist of at least one of the following essential particulars:—(1.) The name of a company, individual, or firm represented in a special or particular manner; (2.) The signature of the applicant for registration or some predecessor in his business; (3.) An invented word or invented words; (4.) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname; (5.) Any other distinctive mark. . . . . For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons. In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered."

This design is clearly a device within s. 3, and there is nothing in the Act to prevent it being registered as a trade mark merely because it is capable of being registered as a design. The registrations are not mutually exclusive. A design for the shape of a patented article can be registered as a design, notwithstanding registration of the patent: *Werner Motors, Ld.* v. *A. W. Gamage, Ld.* (1) The place where the trade mark is put is immaterial, though in the present case it is most conspicuous.

On May 1, 1906, a pattern on the backs of playing cards was registered as a trade mark, No. 52,016, in the United States Patent Office by the New York Consolidated Card Company.

(1) (1904) 21 Rep. Pat. Cas. 621.

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The matter must go back to the registrar to be decided on the merits, i.e., distinctiveness, user, &c., which at present have not been gone into.

George Lawrence, for the registrar. I do not contend that a registrable design cannot be registered as a trade mark, nor do I admit that the registrar has so decided. He has really found that the present design is not a mark. It is not really a device within s. 3, which points to an arbitrary symbol, mark, or device used in connection with completed goods, and not to a mere ornamental pattern, without which the goods, as ornamental playing cards, would be incomplete.

[SWINFEN EADY J. The substantial question is not whether the pattern is a device, but whether it is a distinctive mark within s. 9. That has not been dealt with.]

That is so. The matter had better go back to the registrar, but it would be convenient if the Court would express an opinion on the preliminary point.

SWINFEN EADY J. In my opinion registration as a design and registration as a trade mark are not mutually exclusive, and it is not a fatal objection to an application to register something that is claimed as a trade mark that the subject-matter of the application is capable of being registered as a design. Indeed, the contrary was not contended, but it was said that the ground on which the registrar refused to proceed was the view he entertained on that point. I am not by any means satisfied from a perusal of his reasons that this was the real ground of his refusal; but it has been represented that a decision on the point will be of assistance in the matter. I therefore express my opinion on the point, and refer the matter back to the registrar to deal with as he thinks fit. The registrar will have his costs.

Solicitors: *L. Melville Clark; Board of Trade Solicitor.*

G. R. A.

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Nov. 27.

In re LORD TOWNSHEND'S SETTLEMENT. LORD TOWNSHEND *v.* ROBINS.

[1907 T. 407]

Lunacy—Action by Lunatic—Parties—Committee of Estate—Inquisition—Special Finding—Incapable of managing Affairs—Capable of managing himself—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 98, *sub-s.* 2; *s.* 108, *sub-s.* 3—*Rules of the Supreme Court*, 1883, *Order* XVI. *r.* 17.

Where a lunatic so found by inquisition sues by the committee of his estate under Order XVI., r. 17, the committee must be a co-plaintiff.

Farnham v. *Milward & Co.*, [1895] 2 Ch. 730, 735, followed.

A special finding under s. 98, sub-s. 2, of the Lunacy Act, 1890, that the alleged lunatic, the subject of the inquisition, "is of unsound mind, so as to be incapable of managing his affairs, but that he is capable of managing himself, and is not dangerous to himself or to others," constitutes him a lunatic so found by inquisition within the above practice.

MOTION.

On August 11, 1906, on an inquisition in lunacy, it was specially found and certified under s. 98, sub-s. 2, of the Lunacy Act, 1890, that Lord Townshend "is of unsound mind, so as to be incapable of managing his affairs, but that he is capable of managing himself, and is not dangerous to himself or to others."

On November 5, 1906, Sir Redvers Henry Buller was appointed committee of the estate under s. 108, sub-s. 3. No committee of the person was appointed.

On March 18, 1907, with the approval of the Master in Lunacy, Lord Townshend brought an action against the trustees of his settlement for an account on the footing of wilful default, removal of the trustees and other relief.

The writ was issued in the name of Lord Townshend "by Sir Redvers Henry Buller, the committee of his estate appointed by order dated November 5, 1906," but the committee was not made a co-plaintiff.

The defendants applied to stay proceedings until the writ

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had been amended by adding the committee as co-plaintiff. The Chancery Master refused the application. It was not referred to the judge, but on a subsequent application by the defendants for discovery of documents the judge felt a difficulty in making an order as the action was constituted, and suggested that under the special circumstances the defendants, if so advised, might move to discharge the Master's order. The application for discovery was adjourned into Court to come on with the motion.

J. M. Gover, for the defendants. Order xvi., r. 17, provides that lunatics and persons of unsound mind not so found by inquisition may respectively sue as plaintiffs "by their committee or next friend according to the practice of the Chancery Division." Where a lunatic sues by a committee, that practice requires the committee to be added as co-plaintiff: *Farnham* v. *Milward & Co.* (1); Annual Practice, 1908, p. 175; Daniell's Chancery Forms, 5th ed. p. 110, Form 189AA.

[*Eve, K.C.* That form does not accord with the statement in Daniell's Chancery Practice, 7th ed. p. 134, on which this writ is based.]

The statement is that "An action on behalf of a lunatic by his committee is brought in the name of the lunatic 'by A. B., his committee, appointed by order dated,' &c.; and if brought by a next friend, it is instituted in the name of the person of unsound mind as plaintiff, suing by his next friend." Reading that with the marginal note, "Person of unsound mind should be co-plaintiff or plaintiff," the meaning is clearly in accordance with the form. The context (p. 133) shews that the committee of the estate is referred to. (2)

The special finding and certificate under s. 98, and the appointment of a committee of the estate under s. 108, shew that the plaintiff is a lunatic within the meaning of the rule. A committee is only appointed in the case of a lunatic so found by

(1) [1895] 2 Ch. 730, 735.

(2) Daniell's Chancery Practice (1871), 5th ed. p. 80, states that a lunatic "sues by the committee of his estate, if any, or if none, by his next friend. . . . The lunatic must be named a co-plaintiff," except, perhaps, in suits to avoid his own acts.

inquisition. In the case of a person of unsound mind not so found a receiver is appointed under s. 116. The point is important, as there may be difficulty in getting discovery unless the committee is a party.

Eve, K.C., and *Boome*, for the plaintiff. If the plaintiff is a lunatic so found by inquisition, the committee should perhaps be a co-plaintiff. But the special finding and certificate do not make him a lunatic so found within the rule. He is capable of managing himself, and therefore presumably capable of making an affidavit of documents. We do not object to an order for discovery against him, and it is unnecessary to join the committee for the purpose of discovery. The motion to discharge the Master's order instead of referring it to the judge is irregular: *Harrington* v. *Ramage* (1); but under the special circumstances we do not press this objection.

SWINFEN EADY J. (after stating the facts). The practice in Chancery and in the Chancery Division with reference to actions by lunatics was stated by Stirling J. in *Farnham* v. *Milward & Co.* (2) After referring to the fact that a lunatic sues either by a next friend or a committee, he says: "There is a difference in the practice in the two cases, because from an early period it has been held that where a lunatic sues by a committee the proper practice is that the committee should be added as a co-plaintiff. That was laid down in *Fuller* v. *Lance* (3) in the reign of Charles II. The reason for the distinction, I apprehend, is this, that a committee being entrusted by law, under the authority of the Crown, with the care, management, and disposition of the lunatic's affairs, he is in a position to receive and give a good discharge for property recovered in an action brought by the lunatic, whereas a next friend, who simply intervenes and invokes the jurisdiction of the Court, would not be in a position to do so."

Order XVI., r. 17, provides that "Where lunatics and persons of unsound mind not so found by inquisition might respectively before the passing of the principal Act have sued as

(1) [1907] W. N. 137. (2) [1895] 2 Ch. 730, 735.
(3) (1663) Ch. Cas. Pt. I., 18, 19.

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plaintiffs . . . . in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend according to the practice of the Chancery Division . . . ."

In the case of a lunatic so found it is clear that the practice required the committee to be added as co-plaintiff. It is said that the writ was issued on the authority of Daniell's Chancery Practice, 7th ed. p. 134, which says that "An action on behalf of a lunatic by his committee is brought in the name of the lunatic 'by A. B., his committee, appointed by order dated,' &c.;" and does not expressly mention that the committee must be a co-plaintiff; but a reference to Daniell's Chancery Forms, 5th ed. p. 110, makes it clear that the committee is meant to be joined, Form 189AA running, "A. B., of (*residence and addition*), committee of the estate of C. D., a person of unsound mind, so found by inquisition; and the said C. D., by the said A. B., his committee."

It is therefore clear, according to the practice, that, assuming the plaintiff is a lunatic so found by inquisition, his committee must join as co-plaintiff.

It was urged that the special finding did not constitute the plaintiff a lunatic so found. But in my opinion the plaintiff was found a lunatic by inquisition within the meaning of the Lunacy Act, 1890, and the practice. By s. 341 "lunatic" means "an idiot or person of unsound mind." The plaintiff was found a person of unsound mind under s. 98, sub-s. 2, though only to a limited extent, viz., "so as to be incapable of managing his affairs," and on that finding a committee of the estate was appointed under s. 108, sub-s. 3.

In my opinion that special finding constitutes the plaintiff a lunatic so found by inquisition within the meaning of the statute and the practice, and the committee of the estate must be a co-plaintiff.

Proceedings must be stayed till the writ has been amended accordingly. The application for discovery will go back to chambers.

Solicitors: *J. D. B. Lewis; Coe, Dennes & Robinson.*

G. R. A.

In re BETTON'S CHARITY.

SWINFEN EADY J.

1907

Nov. 19, 28.

[1907 B. 075.]

Charity—Mixed Endowment—Scheme determining what Part held for Education—Effect of Scheme—Permanent or temporary—Board of Education Act, 1899 (62 & 63 *Vict. c.* 33), *s.* 2, *sub-s.* 2—*Board of Education (Powers) Order in Council*, 1902.

A testator who died in 1724 gave his residue to trustees in trust to pay half the income for the redemption of Barbary slaves, one-fourth for certain educational charities, and one-fourth for certain non-educational charities.

In 1846, for want of Barbary slaves, the slave fund income was applied by a Court scheme to assisting charity schools.

By the Board of Education Act, 1899, s. 2, sub-s. 2, the powers of the Charity Commissioners in matters appearing to relate to education may be transferred by Order in Council to the Board of Education, provided that any question whether any part of an endowment "is held for or ought to be applied to educational purposes" shall be determined by the Charity Commissioners.

By the Board of Education (Powers) Order in Council, 1902, it is ordered that all powers (except the powers of appointing official trustees and making vesting orders) shall, so far as those powers relate to endowments "held solely for educational purposes," be transferred to the Board, and where the Charity Commissioners, in exercise of the powers conferred on them by the Charitable Trusts Acts, 1853 to 1894, or the Endowed Schools Acts, 1869 to 1889, determine by scheme or otherwise what part of a mixed endowment is "held for educational purposes," that part shall, "for the purposes of this order," be treated as an educational endowment "held solely for educational purposes."

In 1907 the Charity Commissioners made a scheme under the Charitable Trusts Acts, 1853 to 1894, determining (inter alia) that the slave fund income was "held for and ought to be applied to educational purposes."

The trustees appealed, contending that the effect of the determination scheme would be to devote the income permanently and in all events to educational purposes. At present, notwithstanding free education, there were managers' purposes to which the income was and could be applied under the scheme of 1846 without relieving the rates, but when these expenses also were thrown on the rates there would be no proper objects left under the scheme of 1846. On that event the income ought to be applied cyprés the will as a non-educational charity:—

Held, that the determination scheme merely determined the controlling body for the time being, and did not in any way restrict, alter,

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or affect the objects of the charity or prevent the income being applied by a future scheme to non-educational purposes.

In re Sutton Coldfield Grammar School, (1881) 7 App. Cas. 91, 93, applied.

PETITION.

This was a petition by the Ironmongers' Company presented by way of appeal from an order of the Charity Commissioners sealed June 25, 1907, approving and establishing a scheme under the Charitable Trusts Acts, 1853 to 1894.

By his will, dated February 15, 1724 (new style), Thomas Betton gave the residue of his property to the Ironmongers' Company upon trust to pay one-half of the income for the redemption of British slaves in Turkey or Barbary, one-fourth for charity schools in the City and suburbs of London where the education was according to the Church of England, and not giving any one above 20*l.* a year, and the remaining fourth, after paying thereout 10*l.* a year to the chaplain of the company, was to be applied for the necessitated decayed freemen of the company, their widows and children, not exceeding 10*l.* a year to any family.

The testator died in 1724, shortly after the date of the will. The income of the London and suburbs fund and the decayed freemen fund had always been applied according to the will.

For a period of nearly 100 years after the testator's death large sums of money were paid out of the slave fund income for the redemption of British captives in Turkey or Barbary, the last payment being in or about 1825. There were, however, large accumulations, and it became manifest that the slave fund income was much more than sufficient to meet any demands that might be made upon it for the redemption of slaves. Upon an information by the Attorney-General filed November 23, 1829, a scheme for the future application of the income of the slave fund and accumulations was directed to be settled by the Master.

By a decree of November 12, 1833, Leach M.R. confirmed the Master's recommendation that a sum of 7000*l.* 3 per cent. annuities, part of the accumulations, should be carried over to an account entitled the Slave Redemption Account and accumulated to meet the contingency of there being future slaves, but

there was further litigation as to the other details of the scheme: see *Attorney-General* v. *Ironmongers' Co.* (1)

By an order of Lord Cottenham L.C. made on January 23, 1841, and affirmed by the House of Lords on appeal on June 7, 1844, it was declared that the income of the slave fund and of the accumulations ought to be applied in supporting and assisting charity schools in England and Wales where the education was according to the Church of England, but not to an amount of more than 20*l.* a year to any one school: see *Attorney-General* v. *Ironmongers' Co.* (2)

The matter was referred back to the Master to settle and approve a scheme for that purpose. The scheme was settled on the above lines on December 3, 1845, and approved and confirmed by Lord Langdale M.R. on July 29, 1846.

By an order of Romilly M.R. made November 24, 1858, the future interest on the slave redemption account, which was then 12,000*l.* 3 per cent. annuities, was ordered to be paid to the petitioners until further order to be applied under the scheme of 1846. That scheme had continued in operation down to the present time.

On April 1, 1900, the Board of Education was established under the Board of Education Act, 1899.

Sect. 2, sub-s. 2, provides that "It shall be lawful for Her Majesty in Council, from time to time, by order, to transfer to, or make exerciseable by, the Board of Education any of the powers of the Charity Commissioners . . . . in matters appearing to Her Majesty to relate to education, and the order may make such provision as appears necessary for applying to the exercise of those powers by the Board of Education the enactments relating to the Charity Commissioners. . . . . Provided that any question as to whether an endowment or any part of an endowment is held for or ought to be applied to educational purposes shall be determined by the Charity Commissioners."

Three Orders in Council had been made.

By the third order (Board of Education (Powers) Order in Council, 1902), set out in Tudor on Charities, 4th ed. p. 767, it was

(1) (1834) 2 My. & K. 576; (1840) 2 Beav. 313.

(2) (1841) Cr. & Ph. 208; (1844) 10 Cl. & F. 908.

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ordered that all powers (except the powers of appointing the official trustees of charitable funds and of making vesting orders) should, "so far as those powers relate to endowments held solely for educational purposes, and so far as they have not been transferred to the Board of Education, be transferred to that Board." It was also ordered that "where the Charity Commissioners, in exercise of the powers conferred on them by the Charitable Trusts Acts, 1853 to 1894, or the Endowed Schools Acts, 1869 to 1889, determine, by scheme or otherwise, in respect of any endowment held partly for educational purposes and partly for other purposes, what part of the endowment is held for educational purposes, that part shall, for the purposes of this order, be treated as an educational endowment held solely for educational purposes."

By an order of the Charity Commissioners dated June 25, 1907, and made in the matter of the said charity and in the matter of the Charitable Trusts Acts, 1853 to 1894, a scheme was approved and established by which it was determined that the part of the endowment of the charity which "is held for and ought to be applied to educational purposes" consisted of the income of the London and suburbs fund, the income and accumulations of the slave fund, and the income of the slave redemption account. The determination was made by scheme under the Charitable Trusts Acts instead of by a simple determination order under the Board of Education Act, 1899, in order to give the petitioners a right of appeal.

The petitioners appealed.

Eve, K.C., and *Alfred Adams*, for the petitioners. We do not dispute that the slave fund income and its accretions "ought to be applied to" educational purposes for the time being, i.e., so long as there are objects under the scheme of 1846. If that were all that the recent scheme determined, the Order in Council of 1902 would not apply, and the control of the income would remain with the Charity Commissioners. But the scheme determines that the income is "held for" and "ought to be applied to" educational purposes. This brings the Order in Council into operation, and has the effect of transferring the control of the

income permanently to the Board of Education and devoting it "solely," i.e., "permanently and in all events," to educational purposes. At present, notwithstanding free education, there are purposes to which the fund can be applied under the scheme of 1846 without relieving the rates, such as repairs, enlargement and rebuilding, and other managers' purposes. But when all these expenses are thrown on the rates there will be no proper objects left under the scheme of 1846. On that event the slave fund income, which was bequeathed as a non-educational charity, should be applied cyprès the will as a non-educational charity, and not cyprès the scheme of 1846 for educational purposes in relief of the rates: *In re Poplar and Blackwall Free School.* (1) The scheme should be varied by declaring that the slave fund income and its accretions are held for, and ought to be applied to, educational purposes so long only as there are objects in existence to which the income can be applied under the scheme of 1846.

Vaughan Hawkins, for the Attorney-General. The petitioners are under a complete misapprehension. The Board of Education Act, 1899, is a purely departmental Act. It changes the governing body, but does not affect the trusts of the charity at all. Roughly speaking, the Board of Education is to manage educational charities, and the Charity Commissioners are to manage non-educational charities. Under the scheme of 1846 the slave fund income is in fact "held for" educational purposes, and it "ought to be applied to" those purposes. There is practically no difference between the phrases. The determination scheme follows the wording of s. 2, sub-s. 2, and joins the two phrases, but there is nothing in the scheme to prejudice the objects of the charity.

The effect of the scheme is that for the purposes of the Order in Council of 1902 the slave fund income must "be treated as an educational endowment held solely for educational purposes." But "solely" does not mean "irrevocably" or "in perpetuo." It is merely used to differentiate the endowment from a mixed endowment. There is always a possibility that this or any other educational endowment may in course of time be applied to

(1) (1878) 8 Ch. D. 543.

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non-educational purposes. There is no necessity to limit the determination scheme in the way proposed.

Eve, K.C., in reply. "Held for" is not equivalent to "ought to be applied to": see the Board of Education (Powers) Order in Council, 1900, s. 2, sub-s. 1 (*a*), sub-s. 2 (*b*) (Tudor on Charities, 4th ed. p. 761), where the phrases "held for" and "applicable to" are evidently not treated as synonymous.

Cur. adv. vult.

Nov. 28. SWINFEN EADY J. (after stating the facts). The petitioners, the Ironmongers' Company, contend that the effect of the scheme will be to devote the slave fund income permanently and in all events to educational purposes, whereas it was originally bequeathed for the redemption of slaves, and not for educational purposes at all. They have argued that if circumstances arise, by legislation or otherwise, which will make it impossible in future to apply the income in accordance with the scheme of 1846, it ought then to be applied, as near as may then be, to the original intention of the testator as ascertained by considering his will, and not as a fund permanently or necessarily devoted to educational purposes.

I am of opinion that the scheme of the Charity Commissioners has not the effect attributed to it by the petitioners of permanently and in all events devoting the fund to educational purposes. The scheme does not in any way alter or affect the objects to which the funds of the charity are to be applied. It is merely part of the machinery for adjusting between the two departments—the Charity Commissioners and the Board of Education—the funds held for charitable purposes, and for determining the endowments over which the Board of Education has authority. The scheme merely determines what part of an endowment, held partly for educational and partly for other purposes, is held for educational purposes. It is only "for the purposes of the order" that such part of the endowment is to be treated as an educational endowment held solely for educational purposes. Moreover, "held solely for educational purposes" means, in my judgment, for the time being held for educational purposes only, and not for any other purposes, and does not mean for ever to be held for

educational purposes and for no other purposes. This seems clear, when it is considered what is an "educational endowment" within the meaning of the Endowed Schools Acts.

By the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), s. 5, the term "educational endowment" means an endowment or any part of an endowment which, or the income whereof, has been made applicable or is applied for the purposes of education, whether the same has been made so applicable by the original instrument of foundation or by any subsequent Act of Parliament, letters patent, decree, scheme, order, instrument, or other authority, and by s. 30 of the same Act the Commissioners were empowered in certain circumstances to apply charities of a non-educational nature to educational purposes, and thereupon the same were, for the purposes of the Act, to be deemed "educational endowments." If, therefore, the income of a charity is for the time being applied under a scheme to educational purposes, it is an educational endowment, whatever the provision may have been in the original instrument of foundation: see *Ross* v. *Charity Commissioners.*(1) But wherever the income of a charity is applied under a scheme, whether for educational purposes or for any other purposes, the income is only so applied until further order, or until some further scheme is established, and is not irrevocably devoted for all time to the objects set forth in the scheme, to the exclusion of all others.

The Court of Chancery was in the constant habit of altering schemes settled under its decrees as the alterations of times and circumstances required: *Attorney-General* v. *Bishop of Worcester.*(2) The same rule obtains with regard to schemes established by the Charity Commissioners. In *In re Sutton Coldfield Grammar School* (3) objection was taken to a scheme of the Charity Commissioners that it was wanting in finality, because it was expressed to be without prejudice to a future scheme, and because power was reserved to the Commissioners to frame schemes from time to time for the alteration of any portion of that scheme. Jessel M.R., in delivering the judgment of the Privy Council, said (3): "The result of these declarations"

(1) (1882) 7 App. Cas. 463, 466. (2) (1851) 9 Hare, 328, 356.
(3) 7 App. Cas. 91, 93.

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(the declarations contained in the scheme) "is this, that the scheme is without prejudice to a future scheme to be framed in accordance with the Acts of Parliament. Speaking not otherwise than respectfully of the Charity Commissioners, it appears to their Lordships that those words are surplusage. The Acts of Parliament enable the Commissioners to make schemes from time to time. Nothing that could be done by the scheme could affect the statutory right to make future schemes. The words complained of cannot give the Commissioners any power which the statute does not confer upon them, nor can the omission of those words take away any power. The present scheme cannot either now or hereafter prejudice any future scheme. That being so, of course the whole of the argument that it is not final as regards this scheme falls to the ground. There is nothing said in the scheme as to the application of any future sum, but merely that a future scheme may be made. In other words, it appears to their Lordships that it merely expresses that which the Act of Parliament has already enacted: that a future scheme may be made."

It follows from what I have said that in my judgment the recent scheme of the Charity Commissioners does not in any way restrict or alter the objects of the charity or prevent the funds from being at some future time applied under some different or altered scheme to other than educational purposes, if circumstances should arise rendering that course expedient. The apprehension of the petitioners with regard to the effect of this scheme is in my opinion groundless. I do not make any order on the petition, except that the costs, including the costs of the Attorney-General, may be paid out of the charity income.

Solicitors: *R. C. Adams Beck; Treasury Solicitor.*

G. R. A.

In re DICKIN AND KELSALL'S CONTRACT.

SWINFEN EADY J.

1907

Dec. 4, 5.

[1907 D. 1462.]

Settled Land—Sale by Life Tenant—Mortgagee of Life Estate—Consent—Concurrence in Conveyance—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 20, *sub-s.* 2; *s.* 50.

Where a life tenant sells settled land under the powers of the Settled Land Acts, with the consent of the mortgagee of the life estate, the mortgagee's estate passes by the exercise of the statutory power, and his concurrence in the conveyance is not necessary.

Sects. 20 and 50 of the Settled Land Act, 1882, explained.

Dictum of North J. in *In re Sebright's Settled Estates*, (1886) 33 Ch. D. 429, 438, not followed.

Observations in *Cardigan* v. *Curzon-Howe*, (1888) 40 Ch. D. 338, 342; *In re Du Cane and Nettlefold's Contract*, [1898] 2 Ch. 96, 108; and *In re Mundy and Roper's Contract*, [1899] 1 Ch. 275, 289, explained and applied.

VENDOR AND PURCHASER SUMMONS.

By his will, dated October 14, 1881, a testator devised all his real estate to his eldest son, the vendor, for life, with remainder in the events that happened to the vendor's sons successively, according to seniority, in tail male, with remainder to the testator's own right heirs.

The testator died on May 17, 1882, leaving the vendor his heir-at-law. The vendor at present had no male issue.

By a mortgage dated July 6, 1888, the vendor demised the property to a mortgagee for the term of 100 years if the vendor should so long live, and conveyed his estate in fee simple in remainder expectant upon his death and failure of male issue and all other his estate and interest in the said property to the mortgagee in fee simple, both the demise and conveyance being by way of mortgage for securing payment of the mortgage money.

On July 22, 1907, the vendor, as life-tenant, contracted to sell part of the property to a purchaser.

The present mortgagee, to whom the mortgage had been transferred, gave a written consent to the sale, but the purchaser

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required her to join in the conveyance, as a conveying party, or to convey or reconvey by a separate deed.

The vendor issued this summons for a declaration that the purchaser was not entitled to insist on this requisition.

Underhill, for the vendor. The mortgagee's consent sets free the vendor's statutory power under the Settled Land Act, 1882, and he can convey the fee simple, including the mortgagee's estate, under that statutory power: Wolstenholme's Conveyancing and Settled Land Acts, 9th ed. p. 363; Key and Elphinstone's Precedents, 8th ed. vol. i. p. 659.

Sect. 50 provides as follows: Sub-s. 1: "The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to . . . . an assignee . . . . and remain exerciseable by the tenant for life after and notwithstanding any assignment . . . . of his estate or interest under the settlement." Sub-s. 3: "But this section shall operate without prejudice to the rights of . . . . an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent . . . ." Sub-s. 4: ". . . . in this section assignment includes assignment, by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment."

Sect. 20 provides as follows:—Sub-s. 1: "On a sale . . . . the tenant for life may, as regards land sold . . . . convey . . . . the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale . . . ." Sub-s. 2: "Such a deed . . . . is effectual to pass the land conveyed . . . . discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—(i.) All estates, interests, and charges having priority to the settlement; and (ii.) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed; and (iii.) All leases . . . . grants of easements, rights of

common, or other rights or privileges granted or made for value . . . . or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life."

Now, as the mortgagee has consented under s. 50 the vendor can freely exercise his statutory powers, and the only question is whether the mortgagee's estate is an estate, interest, or charge "conveyed or created for securing money actually raised" within s. 20, sub-s. 2, clause (ii.). In *In re Sebright's Settled Estates* (1) North J. suggested that the life-tenant's mortgage of his life estate fell within clause (ii.). But the suggestion was only a dictum, and it was apparently doubted in *Cardigan* v. *Curzon-Howe* (2), where Chitty J. suggests that clause (ii.) is confined to estates, interests, and charges subsisting or arising under the settlement, and does not extend to independent mortgages by the life tenant or remainderman.

It is reasonably clear that if clause (ii.) extends to a mortgage of the life estate it must also extend to a mortgage of the remainder. Such a construction would involve tracing the remainderman's title and obtaining the concurrence of his mortgagees, and would render the Act unworkable. An absolute assignment of the remainder is overreached by a conveyance under s. 20: *Wheelwright* v. *Walker*. (3) Why should a mortgage be in a different position? Again, on this construction, the life tenant's mortgagee would be absolutely protected by s. 20, and the express protection given by s. 50 would be quite unnecessary. The mortgagee can give a general consent under s. 50: *In re Du Cane and Nettlefold's Contract*. (4) This is quite inconsistent with the view that he must concur in every conveyance.

Archibald Brown, for the purchaser. Sect. 50 enables the life tenant to exercise his powers with the consent of his assignee, but does not remove the restrictions of s. 20. In other words, the life tenant can convey the fee simple, discharged from all estates, interests, and charges subsisting or arising under the

(1) 33 Ch. D. 429, 438.
(2) 40 Ch. D. 338, 342.
(3) (1883) 23 Ch. D. 752.
(4) [1898] 2 Ch. 96, 108.

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settlement, but subject to and with the exception of (i.) all estates and interests having priority to the settlement; and (ii.) all such *other*, if any, estates, interests and charges as have been conveyed or created for securing money actually raised at the date of the deed; and (iii.) all leases, &c., granted under the settlement, or under any statutory power. Having regard to the word "other," it is clear that clauses (i.) and (ii.) must be read together; and there is nothing to limit clause (ii.) to charges arising under the settlement. Clause (i.) refers to charges created before the settlement; clause (ii.) to independent charges or settlement charges created after the settlement for securing money actually raised. Clause (iii.) is confined to leases, &c., under the settlement or statutory power.

The conveyance is therefore "subject to" the paramount charges of clause (i.)—"subject to and with the exception of" the subsequent independent and settlement charges of clause (ii.) (reddendo singula singulis), and "with the exception of" the settlement leases, &c., of clause (iii.). In *In re Sebright's Settled Estates* (1) North J. expressed his opinion that a mortgage by the life tenant fell within clause (ii.). In *Cardigan* v. *Curzon-Howe* (2) Chitty J. doubted whether it fell within clause (ii.), which he read as an exception to "estates, interests, and charges subsisting or to arise" under the settlement. But he pointed out that a mortgage by a life tenant was not an estate, interest, or charge subsisting or arising under the settlement. If that view is correct, the mortgage is not one of the things discharged by the enacting words of s. 20, sub-s. 2. Whichever view is adopted, the result is the same, i.e., the mortgagee must join. Mortgages on the inheritance are also not affected by a conveyance under s. 20: *In re Mundy and Roper's Contract.* (3)

In *In re Du Cane and Nettlefold's Contract* (4) Stirling J. was dealing with the case of an absolute assignment of the life interest, so that the point on s. 20, sub-s. 2, clause (ii.), did not arise.

The result of the Act and authorities is that absolute assignments of the life estate or the inheritance are overreached by

(1) 33 Ch. D. 429, 438.
(2) 40 Ch. D. 338, 342.
(3) [1899] 1 Ch. 275, 289.
(4) [1898] 2 Ch. 96, 108.

a conveyance under s. 20, but mortgages for securing money actually raised are not so overreached, the principle of the Act being that mortgagees are entitled to keep their security on the land: *In re Mundy and Roper's Contract.* (1)

Sect. 50 preserves the life tenant's powers notwithstanding assignment of his life interest, but provides that the rights of an assignee for value are not to be affected without his consent. It was necessary to make "assignment" include "mortgage." so far as the preservation of the powers was concerned; but it was unnecessary for the preservation of the mortgagee's rights. The section, however, must no doubt be read as preserving the rights of "an assignee or mortgagee for value." But this slight redundancy in protecting the mortgagee should not be construed to deprive him of the express protection under s. 20, or to extend the life tenant's powers thereunder.

Cur. adv. vult.

Dec. 5. SWINFEN EADY J. In this case a contract for sale has been entered into by a tenant for life under the powers of the Settled Land Acts. The vendor has mortgaged his life interest, and the mortgagee has consented to the sale pursuant to s. 50 of the Settled Land Act, 1882. The purchaser, however, requires and insists upon the concurrence of the mortgagee in the conveyance as a conveying party, and the vendor contends that such concurrence is not necessary.

The vendor is also, in the events which have happened, contingently entitled in remainder to the fee simple on his death without issue male, and at present he has not any such issue. This interest in remainder is also mortgaged.

It has not been disputed that the present contract for sale is a valid exercise by the tenant for life of his power of sale, nor that the consent of the mortgagee of the life interest has been duly obtained pursuant to s. 50, sub-ss. 3 and 4, of the Settled Land Act, 1882.

But it is urged that, having regard to s. 20, sub-s. 2, clause (ii.), of the Settled Land Act, 1882, a valid and effectual conveyance

(1) [1899] 1 Ch. 275, 289.

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cannot be made without the concurrence therein of the mortgagee of the life estate.

If this be so, it is a singular result of the Act, as it seems clear that, where a tenant for life has absolutely assigned his interest for value, the consent of the assignee to a sale of the land under s. 20 is sufficient under s. 50, and his concurrence in the conveyance is not necessary, since an absolute assignee does not claim any estate, interest, or charge "conveyed or created for securing money" within s. 20, sub-s. 2, clause (ii.).

Again, if s. 20, sub-s. 2, clause (ii.), extends to charges for securing money on the life estate of the tenant for life, it must (as it seems to me) equally apply to charges created by any remainderman or jointress, or indeed by any other person taking a beneficial interest under the settlement. Such a conclusion would go far to render any sale under the Settled Land Acts impossible, as in many cases it could not be ascertained what charges (if any) had been executed by those beneficiaries. As the concurrence of the remainderman in the sale is not necessary—*Wheelwright* v. *Walker* (1)—it is difficult to see upon what principle that of his mortgagee could be required.

The ground for the contention put forward by the purchaser in the present case appears to be a passage in the judgment of North J. in *In re Sebright's Settled Estates.* (2) North J. read s. 20, sub-s. 2, clauses (i.), (ii.), and proceeded: "Mr. Cozens-Hardy says that these words point to mortgages or charges which have been made for raising portions or other such things. I have no doubt they do, but it seems to me that they are not confined to that. I think the words include all estates and interests created subsequently to the settlement for the purpose of securing money, and that they therefore include a mortgage of his life interest made by the tenant for life for the purpose of raising money. Therefore, the conveyance by the tenant for life under the 20th section can only pass the estates subject to any charge by mortgage or otherwise of his life estate which has been made by the tenant for life for the purpose of raising money. Under these circumstances it appears to me that the tenant for life can only convey under the Act so

(1) 23 Ch. D. 752. (2) 33 Ch. D. 429, 438.

as not to affect the charges on the estate, including those charges or incumbrances on the life estate which have been created by himself. When, therefore, his life estate is incumbered up to the hilt, he can only sell that which is practically a reversion, not an estate in possession."

This was a dictum only, and not necessary for the decision of the case. The application to the judge was to make an order for the sale of a mansion-house and park, conditionally upon the consent of the mortgagees of the life estate being obtained. The judge declined to make any order without knowing whether the mortgagees would consent or not, and without having the full facts before him, which would enable him to exercise a discretion; and the Court of Appeal took the same view.

This dictum was considered by Chitty J. in *Cardigan* v. *Curzon-Howe*. (1) He said: "It occurs to me it is open to reconsideration whether the exception in the 2nd sub-section, clause (ii.), is anything more than an exception out of the words 'estates, interests, and charges subsisting or to arise thereunder'—that is, under the settlement. There is this point, which I think is worthy of observation. If a remainderman and tenant in fee mortgage, that is not a mortgage which subsists or arises under the settlement. The charge arises only because a person who has an interest under the settlement, as the holder of any other interest, can assign it or mortgage it; and, by parity of reasoning, I am disposed to think that that would also be the right view with reference to a mortgage created by the tenant for life mortgaging his own life interest. But that, again, would not be an estate, interest, or charge subsisting, arising, or to arise under the settlement; it would be a mortgage made by a man who is the owner of the life estate and is entitled to deal with it as he thinks fit."

It is obvious from this passage that Chitty J. was disposed to think that a mortgage by a tenant for life of his interest under the settlement was not a mortgage coming within the operation of s. 20, sub-s. 2, clause (ii.).

Stirling J. certainly took the same view in *In re Du Cane and*

(1) 40 Ch. D. 338, 342.

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Nettlefold's Contract (1) when he said: "If the dealing which gave rise to the new interest be an alienation by the tenant for life, then the special provisions of s. 50 of the Settled Land Act, 1882, come into operation. Under that section the powers conferred by the Act remain exerciseable by the tenant for life, but so as not to prejudice the rights of an assignee for value, which cannot be affected without his consent. The result is that upon a sale by a tenant for life who has alienated for value the purchaser is in general entitled to ask for evidence of the consent of the assignee. The provisions, however, of this section, being for the benefit of the assignee, might, as I conceive, be waived by himself; and if the instrument of assignment contains a consent by the assignee beforehand, all the powers of the tenant for life under the Act of 1882 would remain."

This statement that a consent given beforehand is sufficient, for all the powers of a tenant for life to remain, certainly means that any further concurrence in the conveyance by the assignee of the life estate is unnecessary to enable the tenant for life, in the exercise of his statutory powers, to convey the fee.

Sect. 20 sub-s. 2, clause (ii.), was again considered by Lindley M.R. and Chitty L.J. in *In re Mundy and Roper's Contract* (2), where they said: "The second"—exception—"is important, as shewing an express restriction on the power of the tenant for life. We find in it a principle. Mortgagees who have actually lent their money on the security of the land are regarded as strangers to the settlement, and are not to have the security which they bargained for on the land itself transferred to the purchase-money at the will of the tenant for life. The same principle is maintained in the 3rd sub-section of s. 50 in favour of an assignee for value of the estate or interest of the tenant for life."

The learned Lords Justices were, however, here obviously referring to mortgages on the security of the fee, on the land itself, and not to charges on the limited interests of any persons derived under the settlement.

In my opinion the true construction of s. 20, sub-s. 2, is to read the words "subject to" as applying to clause (i.), and the

(1) [1898] 2 Ch. 96, 108. (2) [1899] 1 Ch. 275, 289.

words "with the exception of" as applying to clauses (ii.) and (iii.). The "estates, interests, and charges having priority to the settlement" do not subsist or arise under the settlement. It is not necessary to include them in any exception, as they would not otherwise be already included in the preceding words, "estates, interests, and charges subsisting or to arise" under the settlement. Clause (i.), however, makes it clear that, though the conveyance is effectual to pass the land conveyed discharged from the limitations of the settlement, it remains subject to all estates, interests, and charges having priority to the settlement.

Clause (ii.) is strictly an exception. Its function is to exclude something which would otherwise have been included in what has gone before. It only embraces, in my judgment, such estates, interests, and charges, conveyed or created for securing money actually raised at the date of the deed, as subsist or arise under the settlement. Instances of these are mortgages to secure money required for enfranchisement, or for equality of exchange or partition, or for costs, charges, or expenses directed by the Court to be paid out of property subject to a settlement, whether these sums are raised by means of a mortgage in fee, or by the creation of a term, or by means of a charge on the settled land. Charges to secure sums of money actually raised by way of portions, and mortgages made by trustees under any power to mortgage contained in the settlement, also furnish other instances. All these would be estates, interests, or charges subsisting or arising under the settlement.

Similarly all the leases, grants, rights and privileges specified in s. 20, sub-s. 2, clause (iii.), and which are preserved, are estates or interests arising or subsisting under the settlement.

But (as Chitty J. said) a mortgage by a tenant for life of his own interest is not an estate, interest, or charge subsisting, arising, or to arise under the settlement; it does not take effect by virtue of any of the limitations, powers, or provisions of the settlement, but because the person who is owner of the life estate has by the general law the right to assign, mortgage, deal with, or dispose of his life interest, as his own property, in such manner as he may think fit.

Again, if clause (ii.) includes every estate, interest, or charge

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conveyed or created by any beneficiary under the settlement, or even by the tenant for life only, so as to render the concurrence in the conveyance of the assignee or mortgagee necessary, there would have been no reason for the provision in s. 50 requiring the consent of assignees and mortgagees to the exercise of powers by a tenant for life.

For these reasons I am of opinion that the concurrence of the mortgagee of the life estate in the conveyance cannot be required.

I am fortified in the conclusion at which I have arrived, by the fact that the text-writers have almost if not quite unanimously taken the same view of the Act.

Solicitors: *Gibson & Weldon, for Edward Bygott, Wem; Rooke & Sons, for W. Gough Thomas, Ellesmere.*

G. R. A.

NEVILLE J.
1907
Nov. 14, 15.

CROYDON CORPORATION *v.* CROYDON RURAL DISTRICT COUNCIL.

[1906 C. 3249.]

Local Government—Rural Authority—Construction of Sewers—"Special Expenses"—Contributory Area—Judgment for Arrears of Rates—Retrospective Rate—Mandamus—Judicial Discretion—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 28, 229, 230.

Under three agreements made in 1900 between the plaintiffs and defendants certain sewers were constructed in three parishes within the defendants' district and were connected with the plaintiffs' drainage system, and it was agreed that the defendants should pay the plaintiffs annually a rent calculated on the rateable value of all property in the three parishes which should be liable to contribute to the rates for special expenses under the Sanitary Acts, such rent to be paid quarterly. From April, 1901, to September, 1905, by a common mistake the defendants only paid annually a rent calculated on the rateable value of the houses in the three parishes actually connected with the plaintiffs' system instead of on the rateable value of all the property in those parishes liable to contribute to the rates for special expenses. The mistake was discovered in September, 1905, when negotiations ensued and the amount of the arrears was ascertained. The defendants, however, having no moneys available to pay the arrears, the plaintiffs in October, 1906, brought an action to recover the arrears, and for a mandamus to enforce the levy of a rate to satisfy the arrears:—

Held, that the plaintiffs were entitled to judgment for the amount of the arrears, but that, even if the debt could be said to accrue at the

date of the judgment, the Court would not, in the exercise of its judicial discretion, order the levy of a rate which would throw upon the rates of one year an expense with which that year had no connection. A mandamus was therefore refused.

Reg. v. *Leigh Rural Council*, [1898] 1 Q. B. 836, discussed.

ACTION.

Under the provisions of s. 28 of the Public Health Act, 1875, the plaintiffs and defendants in January, 1900, entered into an agreement under which the plaintiffs were to construct certain sewers in their area, and the defendants were to construct certain sewers in the parish of Coulsdon, which was in their district, and the sewers in this parish, when constructed, were to be connected with the drainage system of the plaintiffs. The agreement further provided that the defendants should pay the plaintiffs for such user of their drainage system, so long as such user should be continued, a certain yearly rent equal to from 6*d.* to 8*d.* in the pound on the rateable value for the time being of all property within the part of the parish of Coulsdon which should be liable to contribute to the rates for special expenses under the Sanitary Acts, and that this rent should be paid quarterly. At the same date the plaintiffs and defendants entered into similar agreements with respect to the parishes of Sanderstead and Beddington, both of which were in the defendants' district. The sewers were constructed in the three parishes, and were connected with the drainage system of the plaintiffs in accordance with the agreements, and from April, 1901, to September, 1905, the defendants yearly paid the plaintiffs the amount of the rent demanded. It was then discovered that by a common mistake the rent demanded and paid during the period in question was only the amount calculated on the houses in the parishes actually connected with the drainage system of the plaintiffs instead of an amount calculated on the rateable value for the time being of all property within the said parishes liable to contribute to the rates for special expenses under the Sanitary Acts. The arrears of rent so payable exceeded 5000*l.* Negotiations ensued, and in March, 1906, the defendants, having in their hands about 1000*l.* belonging to the three parishes and available for special expenses, paid that sum to the plaintiffs, and thus reduced the arrears to 4326*l.* 1*s.* 3*d.*, and with the view of

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spreading the payment of the balance of the arrears over several years, they, under ss. 229 and 230 of the Public Health Act, 1875, issued precepts to the overseers of the parishes of Coulsdon and Sanderstead respectively for special expenses for the half-year ending September 30, 1906, including 475*l.* in the case of Coulsdon and 75*l.* in the case of Sanderstead, to meet in part the arrears in question. The Sanderstead overseers refused to levy a rate for the 75*l.* on the ground that such rate would be retrospective and illegal. The Coulsdon overseers levied the rate, but on appeal to quarter sessions it was quashed on the same grounds on July 5, 1906. The defendants then, having no money available for payment of the said arrears, refused to pay the same. The plaintiffs thereupon in October, 1906, commenced this action, and claimed judgment for the 4326*l.* 1*s.* 3*d.*, together with 636*l.* for interest thereon at the rate of 5*l.* per cent. per annum from the respective dates when the several sums making up that aggregate sum ought to have been paid; and they also claimed a mandamus commanding the defendants to issue precepts to the overseers of the said three parishes respectively for levying a rate sufficient to cover the amount of the judgment and costs.

The defendants by their defence did not admit that the 4326*l.* 1*s.* 3*d.* was due to the plaintiffs, but at the trial it was conceded that the plaintiffs were entitled to judgment for that sum with interest as claimed. There was also evidence that to a large extent the present ratepayers in the plaintiffs' and defendants' districts were a different body of persons to the ratepayers during 1901 to 1905.

Warmington, K.C., and *Cozens-Hardy*, for the plaintiffs. Under ss. 229 and 230 of the Public Health Act, 1875, the maintenance and construction of these sewers were "special expenses" of the three parishes, which are "contributory places" within the meaning of s. 28 of the Act, and these special expenses are to be raised and paid by levying a separate rate. The debt is now admitted, and we are entitled to a mandamus under s. 25, sub-s. 8, of the Judicature Act, 1873, and Order LIII., which are in substance equivalent to the old practice under ss. 68—71 of the Common Law Procedure Act, 1854, and s. 32 of the

Common Law Procedure Act, 1860; and the defendants being indebted, they are bound to levy a rate without limitation of time: *Ward* v. *Lowndes* (1); *Webb* v. *Herne Bay Commissioners.* (2) There is no general law that rates cannot be levied retrospectively. It all depends upon the language of the particular statute under which the levy is to be made: *Harrison* v. *Stickney.* (3) Moreover, the judgment operates as a new debt, and a rate to satisfy it can be levied within six months: *Reg.* v. *Leigh Rural Council.* (4) No laches or delay can be imputed to us, and we have done nothing to forfeit our rights. We are not asking for a prerogative writ in this action, but for an order equivalent to a mandamus; the distinction is pointed out in *Smith* v. *Chorley District Council.* (5)

Macmorran, K.C., and *E. J. Naldrett*, for the defendants. It is not disputed that the plaintiffs are entitled to judgment, nor that there is jurisdiction to grant a mandamus; but we say that it is a futile judgment, and that the Court will not grant a mandamus to issue precepts which cannot be enforced: *In re Bristol and North Somerset Ry. Co.* (6) The principle underlying all the authorities is that a retrospective rate for special expenses, which are a past debt, is illegal: *Saul* v. *Wigton Rural Sanitary Authority* (7); *Reg.* v. *Bedlington Overseers* (8); *Smith* v. *Southampton Corporation.* (9) In *Burland* v. *Kingston-upon-Hull Local Board* (10) a mandamus was refused. *Reg.* v. *Leigh Rural Council* (4) is clearly distinguishable. There the debt was disputed, and there were cross claims, and there was no ascertained debt until the judgment in the action, and therefore it was not really a question of a retrospective rate for a past debt. Here the debt is not disputed, and the amount was ascertainable every quarter, but by a common mistake the proper amount was not demanded or paid, and that was the fault of the plaintiffs. But if it is a question of judicial discretion, it is submitted that the Court will not throw on the present ratepayers the burden of a past debt properly payable years ago by a different body of ratepayers.

(1) (1859) 1 E. & E. 940.
(2) (1870) L. R. 5 Q. B. 642, 651.
(3) (1848) 2 H. L. C. 108, 125.
(4) [1898] 1 Q. B. 836.
(5) [1897] 1 Q. B. 532, 540.
(6) (1877) 3 Q. B. D. 10.
(7) (1886) 56 L. T. 438, 440.
(8) (1884) 48 J. P. 486.
(9) [1902] 2 K. B. 244, 252.
(10) (1862) 3 B. & S. 271, 277.

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Cozens-Hardy, in reply, cited *Worthington* v. *Hulton* (1); *Reg* v. *Rotherham Local Board* (2); *Reg.* v. *Read.* (3)

NEVILLE J. In this case certain sewers were constructed by the plaintiffs and the defendants under certain agreements into which they entered in the year 1900, and the defendants agreed to make certain cash payments in respect of the construction of the sewers and to pay yearly a rate of 6*d.* and 8*d.* upon the rateable value of the districts affected. The sewers having been constructed and the sewage scheme being in operation, the plaintiffs only claimed from the defendants the rate in respect of the rateable value of those houses which were connected with the sewage system, and this method of demanding payment went on for several years until, a little more attention being paid to the matter, it was discovered that the amount due from the defendants to the plaintiffs had been calculated on a wrong basis, so that, if they had had their due, the plaintiffs would have received some 5000*l.* more from the defendants than in fact had been paid, that sum being roughly the aggregate of the deficiency during the years in question. That being so, the plaintiffs have sued the defendants under their covenant in the agreements for the balance of this amount (a sum of about 1000*l.* having been paid on account with moneys available for the purpose) and it is not contested now that they are entitled to recover judgment; but the defendants say, and that is not disputed, that they have no funds out of which to satisfy the amount, and thereupon the Court is asked by the plaintiffs to grant a mandamus calling upon the defendants, under the provisions of the Public Health Act, 1875, to direct the overseers of the three parishes in question to levy a rate so as to put them in funds for the purpose of liquidating the judgment which the plaintiffs are entitled to. Those being the facts, I have to consider upon the authorities whether in this case a mandamus ought to be or can be granted. In the first instance, I think, in considering the authorities, one ought to bear in mind that in *Harrison* v. *Stickney* (4) the House of Lords laid it down, adopting the

(1) (1865) L. R. 1 Q. B. 63, 65.
(2) (1858) 8 E. & B. 906.
(3) (1849) 13 Q. B. 524.
(4) 2 H. L. C. 108.

language of Parke B. in delivering the opinion of the judges when advising the House (1), that there is no rule of law which prohibits a retrospective rate; and that in every case of rating the question is whether the Act under which a rate is made, either expressly or impliedly, prohibits such rate from being retrospective; and I think that prior to the case of *Reg.* v. *Leigh Rural Council* (2), which I will deal with presently, there is abundant authority to shew that with regard to a poor rate it was illegal to levy a rate for the payment of debts which had been incurred prior to the rating year. To this there seems to have been an exception, if it can be called an exception, that that rule was not to apply to a case where, although the legal liability might have arisen before the rating year, the amount payable under that liability was not ascertainable until the rating year in question. Now I think that it is quite clear on the authorities that the construction put upon the Act was arrived at by consideration of the fact that any other construction would throw upon one set of ratepayers expenses which were incurred on account of, and ought to be discharged by, another set of ratepayers. The law standing in that position, the case of *Reg.* v. *Leigh Rural Council* (2) came before the Court of Appeal, and I have to consider what that case was intended to lay down. Having regard to the fact that the House of Lords had held it to be a question of construction, and to the state of the authorities at the time, none of which that case purports to overrule, I find some difficulty in precisely ascertaining what is the exact bearing of the judgments of the Lords Justices. I think that undoubtedly *Reg.* v. *Leigh Rural Council* (2) is not on all fours with the present case, but if a principle is to be extracted from it I certainly ought not to shrink from applying that principle to the present case. It seems to me that there are two views of the decision in *Reg.* v. *Leigh Rural Council.* (2) One is this, that the judgment turns upon the finding of the Court that the debt there was not ascertainable in amount until judgment had been obtained for it. The other view is this, that the debt in that case was not antecedent to the rating year in which it was sought to levy a rate to pay it, because the debt accrued at the

(1) 2 H. L. C. 125. (2) [1898] 1 Q. B. 836.

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date of the judgment. This, of course, would be a decision of very wide application, because it would amount to this, that in every case where judgment is obtained against a local authority under this Act the payment of the amount of the judgment debt by the levy of a rate in the year in which the judgment was obtained would not be retrospective, and therefore would be a rate legitimately leviable during the rating year. If the second view is the true view of what was intended to be decided, then a further point is raised, and that is this, that in such a case the Court has to exercise a discretion in considering whether in aid of the judgment a mandamus should go enforcing the levy of the rate. From this point of view I think that I must take it that in that case the Court came to the conclusion that its discretion was properly exercised by granting a mandamus. But I have to consider whether, under the circumstances before me, in case it is a question of discretion, I ought to exercise that discretion by granting a mandamus. Upon the first of the above views of *Reg.* v. *Leigh Rural Council* (1) there is no difficulty, because it seems to me quite clear that the debt in this case was ascertainable at the time when it originally became payable, and it was only not ascertained, if that expression describes the position, because the plaintiffs misunderstood their rights (I think the misunderstanding was common to both parties), and did not receive, nor did the defendants pay, the full amount due in the years in question. I think, therefore, in the present case, that if it is true that under ss. 229 and 230 of the Public Health Act, 1875, a rate cannot be levied retrospectively, the decision must be against the plaintiffs, because, subject of course to the other view which may be taken of that case, it would be a retrospective levy. On the other hand, if the judgment makes it a new debt, then it has to be considered whether, as a matter of discretion—and of course that means judicial discretion—a mandamus ought to go. I think that the only legitimate ground upon which such a discretion can be exercised is this, that primarily the rates are to be levied in respect of the expenses incurred during the year and that, unless there is some sufficient

(1) [1898] 1 Q. B. 836.

ground to the contrary, the Court ought not by means of a mandamus to throw a payment on one set of ratepayers which ought to have been made by another set of ratepayers. In the present case it will be observed that, if a rate is levied for the purpose of satisfying this judgment debt, neither the persons who will have to pay the rate are the persons on whose account the expenses were incurred, nor are the ratepayers who will receive the rate, or whose rates will be reduced by the payment, the persons who suffered the loss in the previous years arising from the failure of the plaintiffs to demand the proper sum from the defendants. It appears to me that in the exercise of the discretion, if indeed it has to be exercised in this case, what I really have to consider is, whether the expense in respect of which the mandamus is demanded is an expense that properly falls upon the year in which the rate may be levied. If, as I think in this case, it is quite clear that the effect of levying the rate would be to throw upon the rates of one year an expense with which that year has in fact no connection whatever, then the discretion ought to be exercised by refusing the mandamus. I therefore come to the conclusion that there must be judgment for the 4326*l.* 1*s.* 3*d.* claimed under the covenant in the agreement which is under seal, with interest at 5 per cent. as claimed; and, secondly, that no relief can be given in respect of a mandamus. The only question that remains is as to the costs. The defendants disputed as a matter of pleading the plaintiffs' right to their judgment for the amount claimed; and, on the other hand, the really important part of the case was the question whether or not a mandamus should be granted. I think the right thing to do is to make a strict order with regard to the costs. Therefore, so far as the action seeks the recovery of the debt, I give the costs to the plaintiffs, and so far as the action seeks a mandamus I give the costs to the defendants, and one set of costs is to be set off against the other.

Solicitors: *Smith, Rundell & Dods, for F. C. Lloyd, Croydon; C. E. S. Whitford.*

H. L. F.

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Oct. 15, 16, 17, 18, 21, 22, 23, 24; *Nov.* 18.

LORD CHESTERFIELD *v.* HARRIS.

[1906 C. 2036.]

Fishery—Riparian Owners—River within Limits of Manor—Freeholders of Manor—Common of Fishery—Profit à prendre—Fluctuating Body—Prescription—Presumption of Legal Origin.

A claim by prescription for the freeholders of a manor to a free fishery or common of fishery in a river within the limits of the manor is a right in the nature of a profit à prendre, and is legally capable of proof.

Warrick v. *Queen's College, Oxford*, (1871) L. R. 6 Ch. 716, and *Chesterfield* v. *Fountaine* (post, p. 243) followed.

Where such a right is established by evidence the Court may presume a grant from the lord to an individual of a right to fish in common with the other freeholders within the manor, accompanying each original grant of a freehold, or, in the case of a royal manor, a grant from the Crown incorporating the freeholders within the manor.

A grant of a right to fish without stint appurtenant to land is good, and need not be limited to a user for the tenant and his domestic servants, and may be granted in common to the owners of several parcels of land, although the subsequent sub-division of the lands may lead to an indefinite increase in the number of persons entitled to exercise the right.

ACTION.

The plaintiff Lord Chesterfield was tenant for life in possession under a settlement of divers lands in the parishes of Holme Lacy, Ballingham, and Dewchurch, in the county of Hereford, situate on the west side of and abutting on the river Wye as it runs from Hereford to Ross; and his co-plaintiff Mrs. Foster was tenant in fee simple in possession of divers lands in the parishes of Sollers Hope and Brockhampton, in the same county, situate on the east side of and abutting on the Wye. The lands of the plaintiffs, where they respectively abutted on the river, were opposite to each other for about three miles, and the plaintiffs claimed that as riparian owners they were entitled between them to the whole bed of that portion of the river Wye where their lands were opposite each other. The plaintiffs alleged that the stretch of water in question was non-tidal and a private stream, and that they, as such riparian owners, were the only persons entitled to fish therein. The plaintiffs

further alleged that the defendants Harris and Bailey, although repeatedly forbidden so to do, persisted in fishing in the stretch of water in question, and had on numerous occasions caught and carried away large quantities of salmon and other fish; and the plaintiffs claimed a declaration that the defendants were not entitled to fish in the stretch of water in question, and an injunction to restrain them from so doing. The defendants, both of whom were fishermen and freeholders of the hundred or manor of Wormelow, admitted that the stretch of water in question was non-tidal, but denied that the plaintiffs had the exclusive right of fishing therein; and in other respects they traversed the allegations of the plaintiffs, and alleged that the whole bed of the river for some seven miles extending from a place called Blackwall Ditch on the north to a place called Gorse Acre Gate at Strangford on the south, which included the stretch of water in question, was within the limits of the hundred or manor of Wormelow, and was vested in the lordship of the hundred or manor of Wormelow subject to the rights of the freeholders in the same hundred or manor to free fishery or common of fishery therein. They also alleged that they and their respective predecessors in title from time immemorial before action brought enjoyed as of right, as freeholders of the said hundred or manor of Wormelow without interruption, free fishery or common of fishery in the said stretch of water with boats and with the right of fastening their nets to the banks of the river; alternatively, they claimed to be entitled to the said free fishery or common of fishery by virtue of a lost grant. They further alleged that the fisheries in the river Wye from Blackwall Ditch to Strangford, subject to the said free fishery or common of fishery vested in the freeholders of the said hundred or manor of Wormelow, had been for not less than 700 years, and were then vested in the lord of the hundred or manor of Wormelow, and that by custom of the hundred or manor the defendants and all other the freehold tenants thereof whose freehold was situate in either of any of the parishes or townships adjoining the Wye had been from time immemorial, and were then entitled to use and enjoy the said free fishery or common of fishery. A mass of documentary evidence was put in

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on both sides. The Earl of Chesterfield traced his title back to 1216, but Mrs. Foster did not carry back her title to a fishery further than 1892. The defendants traced the title and history of the hundred or manor of Wormelow back to Doomsday Book; in particular, they relied on certain inquisitions post mortem, presentments to the court leet, and perambulations of the manor, which are sufficiently mentioned in the arguments and judgment. (1) The defendants also adduced parol evidence which went to shew that the waters of the Wye from Blackwall Ditch to Gorse Acre Gate were known as the "free water" or "free fishery"; that they and their respective predecessors in title and other freeholders of the manor had for a period exceeding 100 years fished in the "free water" with boats and nets under the claim of right aforesaid; and they proved that in the year 1894 the plaintiff the Earl of Chesterfield prosecuted one Fountaine (who was a freeholder in one of the parishes adjoining the Wye in the manor of Wormelow) for fishing in the "free water." Fountaine set up the same claim of right, and the magistrates declined to convict, but stated a case, which came before a Divisional Court consisting of Wills and Wright JJ. That Court affirmed the decision of the magistrates. (2) It also appeared that under the Act 7 & 8 Will. 3, c. 14, the navigation and fisheries of the river Wye were controlled by conservators, who made by-laws regulating the fisheries and fixed the amount to be paid for fishing licences which were taken out annually, and that the defendants had taken out fishing licences.

Warmington, K.C., T. T. Method, and *H. S. Moore*, for the plaintiffs. Lord Chesterfield, as the lord of the manor of Ballingham and of the lands in the parishes of Ballingham and Holme Lacy bordering on this stretch of water, and Mrs. Foster, as the owner of lands in the parish of Brockhampton bordering on the opposite side of the same water, are riparian owners. Riparian ownership includes prima facie the right of fishing ad medium filum, so that the plaintiffs between them have the exclusive right of fishing in this stretch of water unless it is

(1) References collected in Stuart Moore on Fisheries, p. 59.

(2) See note at end of this report, post, p. 243.

displaced by evidence, and the onus is on the defendants to displace our rights. There is no difference between a "free" fishery and a "several" fishery: *Malcomson* v. *O'Dea*. (1) Both mean an exclusive right to fish, with or without ownership of the soil, and the defendants must prove such a right in themselves. They claim a right of fishing for the freeholders in the hundred and manor of Wormelow, but that is a claim for a fluctuating body and is bad. They also claim the right as appurtenant to their freeholds, and that is a right which can only be for the use of the tenement, and cannot justify a claim to fish and carry away and sell wholesale and retail.

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Micklem, *K.C.*, and *Ellis Griffith*, for the defendants. The presumption relied on by the plaintiffs is rebutted by their own documents, which shew that at some time or other there were other rights of fishing in this water, besides those of the riparian owners, and all arising from royal grant. Again, the presumption is rebutted if it can be shewn that the water has been used in a manner inconsistent with the claim of the riparian owners, i.e., that the right to fish and the soil of the river was not vested in the plaintiffs' predecessors in title, but in the lord of the manor of Wormelow: *Duke of Devonshire* v. *Pattinson*. (2) Our documents shew that the manor of Wormelow has always included the whole of the bed or soil of the river from Blackwall Ditch to Strangford, except such parts as have been cut out by royal grant. The bed or soil of the river, therefore, is part of the lord's waste or demesne subject to the rights of common he has granted to his tenants. It is a strange fact that as early as 20 Edward I. the men of the King by proceeding in quo warranto claimed a common of fishery in the river immediately above Blackwall Ditch and also immediately below Strangford. The claims failed, but suggest an inference that this particular stretch of the river was a free fishery held in common by the freeholders of the manor. We do not dispute the plaintiffs' right to fish, but we say that they are not entitled to the exclusive right of fishing they claim, and that they cannot interfere with us. Our documents shew that as far back as 1609 the lord of the manor in his court exercised jurisdiction over the river Wye, and

(1) (1862) 10 H. L. C. 593, 618. (2) (1887) 20 Q. B. D. 263.

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the survey and perambulation of 1639 shew the whole of this stretch of the river to be within the limits of the manor, and there is no trace of any deviation from those limits. Lastly, outside our documents, our evidence destroys the plaintiffs' claim as riparian owners, and shews that for a period going back some 120 years the freeholders of the manor have claimed and exercised the right of free fishery in this water. It is a right which is legally capable of proof, for a fluctuating body can have a profit à prendre, and it can be created by grant and can prescribe: *Goodman* v. *Saltash Corporation* (1); *Wickham* v. *Hawker* (2); *Chesterfield* v. *Fountaine* (3); *Warrick* v. *Queen's College, Oxford* (4); and the Court can presume a grant to each tenant of a right appurtenant to the freehold, which need not be limited to a user for the tenement, or the Court could presume a grant from the Crown, as the manor of Wormelow was a royal manor, and such a grant would incorporate the freeholders quoad the grant: *Willingale* v. *Maitland* (5); *Chilton* v. *London Corporation.* (6)

Warmington, K.C., in reply. The defendants are the only two persons who are fishing with nets in this water, and they are the only persons who can exercise that right, because they are the only persons who have taken out such a fishing licence. Their acts are destructive of the fishery. They claim a right of fishery for the freeholders of the manor, first, under their documentary evidence; and, secondly, by virtue of long user, which they allege presumes a lost grant. In Doomsday Book there is no manor of Wormelow, but a hundred of Wormelow and a manor of Irchenfield. The customs of the manor are set out, which do not mention a fishery. In the hundred of Wormelow a fishery is mentioned which is totally distinct from this fishery. A hundred was a tract of land, which would include many manors, and to which various jurisdictions were granted to look into offences against the King, and had a court by royal grant, called a court leet, and was not the court of the lord of the manor, called a court baron: Kitchin on Courts, ed. 1656,

(1) (1882) 7 App. Cas. 633, 654.
(2) (1840) 7 M. & W. 63, 78.
(3) Post, p. 243.
(4) L. R. 6 Ch. 716.
(5) (1866) L. R. 3 Eq. 103.
(6) (1878) 7 Ch. D. 735.

pp. 81, 115; Scroggs' Practice of Courts Leet and Courts Baron, ed. 1714, p. 73. The inquisition post mortem on the death of Elizabeth, wife of Richard Talbot, mentions the hundred of Irchenfield and the manor of Wormelow, in which there were "no buildings and demesne lands." The term "demesne lands" is the widest description that one can use of lands in the hands of the lord of a manor, and includes the lord's waste: Coke's Compleat Copyholder, ed. 1650, pp. 12-13; Elton on Copyholds, 2nd ed. p. 11; *Attorney-General* v. *Parsons* (1); and therefore, if there were no demesne lands, the bed or soil of this river could not be part of the lord's waste. Then the presentment of 1639 is made to the court leet, and is an invalid attempt to build up and extend the right claimed. It alleges a right to sell wholesale and retail on the fish boards at Hoarwithy. That is inconsistent with a right of fishery appurtenant to a freehold, and if the right is sought to be enlarged then it is lost: *Bailey* v. *Stephens.* (2) Assuming that the perambulation and presentment of 1639, taken together, shew a right of common of fishery to all the freeholders of the manor, it must be a right appurtenant to their freeholds, i.e., the right must be exercised for the benefit of such freeholders and their domestic servants, and does not involve the right to carry away and sell: Blackstone's Commentaries, ii. 35, where he speaks of a common of piscary being given for the sustenance of the tenant's family. Such a right for a large and indefinite class of freeholders cannot be claimed by custom—it must be by grant: *Clayton* v. *Corby* (3); *Tilbury* v. *Silva* (4); and it must be such a right as can have a legal origin. A grant to the freeholders generally would be a grant in gross, and would be too indefinite; but, assuming in 1639 a grant in gross to the freeholders of the manor, that would be a grant to each individual freeholder at the time so long as he was a freeholder, and must be appurtenant to his freehold, and that is fatal to the claim to carry away and sell: and then there must be an ancient tenement, limited and defined, within the manor. Here Harris says his grandfather put up a wooden shed and afterwards his father built a cottage. That is not an

(1) (1832) 2 C. & J. 279, 308.
(2) (1862) 12 C. B. (N.S.) 91.
(3) (1843) 5 Q. B. 415.
(4) (1890) 45 Ch. D. 98, 110.

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ancient tenement. Lastly, a grant from the Crown to the freeholders of the manor cannot be presumed unless it incorporates them: *Lord Rivers* v. *Adams* (1); but there is no trace of such a corporation here, nor of any grant to the lord of the manor in trust for the freeholders.

Micklem, K.C., on the cases last cited.

Cur. adv. vult.

Nov. 18. NEVILLE J. The plaintiffs as riparian owners sue the defendants, who are fishermen by trade, for fishing in the waters of the Wye opposite the banks of the river owned by the plaintiffs. The defendants set up a claim of right as freeholders in parishes adjoining the river Wye within the manor of Wormelow to fish in the waters of the Wye between Blackwall Ditch to the north and Gorse Acre Gate in Strangford to the south. The water in respect of which the right is claimed is a stretch of the Wye some seven miles in length as it flows from Hereford to Ross. The plaintiff the Earl of Chesterfield owns land adjoining the river on the right bank, chiefly at Ballingham, while the plaintiff Mrs. Foster owns land opposite on the left bank at Brockhampton. The defendant Harris is a freeholder within the manor of Wormelow in the parish of Kings Caple, and the defendant Bailey is a freeholder within the same manor in the parish of Hentland, both of which parishes adjoin the river Wye. The fishing has been conducted from boats; until recently with tuck nets and beat nets, and, where rights on the bank were obtained, with draught nets. The use of the beat net only is now legal. The parol evidence shews that the defendants and others have openly fished the water in question under claim of right as freeholders within the manor of Wormelow without interruption for a period of upwards of 100 years. The river between Blackwall Ditch and Gorse Acre was known throughout the neighbourhood as "the free water" or "free fishery," the fishermen as "free fishermen." The boats from which they fished were to be seen upon the river; they exercised their avocation openly and persistently. Harris's father and grandfather and Bailey's grandfather fished before

(1) (1878) 3 Ex. D. 361, 364.

them, and the fact that the so-called free fishermen fished and claimed a right to fish was perfectly well known to every one interested in the matter. The right of the free fishermen seems to have been recognized by Sir Henry Stanhope, the grandfather and predecessor in title of Lord Chesterfield. In or about 1895 one Fountaine, who had purchased a freehold to qualify as a free fisherman, was summoned by the Earl before the magistrates for fishing. Upon his raising a claim of right the magistrates dismissed the summons. Upon a case stated their action was upheld, Wills J. and Wright J. holding that the claim was capable of proof. After this attempt to stop the fishing the free fishermen, including the defendants, continued to fish as before. On several occasions during the last century free fishermen were summoned for fishing; in each case the claim of right was raised, once only was a conviction obtained, and in no case does it appear that the fishing was stopped. The single conviction I will deal with later on. If the evidence rested here, I think the enjoyment of the fishing has been exercised so long, and so strongly points to the existence of a legal right, that I should be bound to attribute to it a legal origin, if, indeed, it be a right which could be legally created. Much documentary evidence has, however, been put in, to some of which I shall shortly refer. The hundred of Wormelow is referred to in Doomsday Book, and at one time appears to have been identical with Irchenfield, a name which later fell into disuse. The first we hear of a common fishery is in the Assize Rolls in the reign of Edward I., in which in proceedings in quo warranto a claim appears to have been made in respect of the Tregoze fishery which failed. The Tregoze fishery can still be identified, and lies immediately below the Gorse Acre, the lowest point of the so-called free water. At the same assize, apparently, a claim was also made in respect of the Fownhope fishery, which can still be identified, and lies immediately above Blackwall Ditch. There is, however, it appears, a dispute of some standing as to whether the Fownhope fishery on the left bank does not extend to the foot of Kapler Wood, which is somewhat lower than Blackwall Ditch. For the purposes of this case I do not think the point material. The claim to the Fownhope fishery also failed. In the 20th

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year of Edward III. the King exchanged the manor of Wormelow (the first time we hear of the manor) and the land and hundred of Irchenfield with Richard Talbot and Elizabeth, his wife, for a manor in Hertfordshire; the general words include vivaries and fisheries. By an inquisition post mortem taken in the 14th year of Edward IV. we read of the manor of Irchenfield and the hundred of Wormelow, and I think at this date Irchenfield and Wormelow must have comprised the same area, and the hundred and manor must have been coterminous. At all events, "Irchenfield" drops out subsequently, and we are left with the hundred or manor of Wormelow From the year 1806 the court rolls of the manor of Wormelow are complete. The bulk of the earlier rolls appear to have been dispersed and lost; but certain documents which seem to be copies or translations of entries in the court rolls, forming part of a collection of manuscripts known as Hill's collection, which was produced from the priory of Belmont, have been very fairly admitted by the plaintiffs. The earliest entry with regard to fishing is at a court held in the 7th year of James I., in which certain persons living within the manor or hundred of Wormelow are presented for fishing in the river Wye within the villat, not being tenants of the manor. There is next an extract dated 1637 containing a presentment with regard to the right of fishing; it runs as follows: "The aforesaid persons also say and present on their oath aforesaid that every freeholder of the said manor or hundred (whose freehold is situate in either or any of the parishes or townships adjoining to the river) have and ought to enjoy a right of free fishery in the river Wye and Garren for themselves and their domestic servants for all such freehold as lies within any or either of the parishes, villats, or townships which adjoin to the aforesaid river except in such parts of the river where any of His Majesty's subjects have or ought to have a right of free fishery either by grant of the said King or any of his ancestors, or by prescription." The Garren is a small stream running into the Wye, with which this case is not concerned. Another extract from the same collection gives a presentation to a similar effect in 1639, with the addition of a curious condition as to the exposure and sale of the salmon

taken by the free fishermen upon the fishboard at Hoarwithy, and concludes as follows: "And likewise they say and present that no person is able to have privilege or fishery within the river of Wye aforesaid save he be a freeholder within the manor or hundred aforesaid, and then to wit of fishery with nets and engines according to the laws and statutes of this kingdom of England for such places specified and not with others." Comparing this translation with the translation of what must have been an earlier document, a copy of which was published in the *Hereford Journal* in 1875, it seems probable that the copy or translation was not quite accurate. I may say here that, although from comparison of the old copies of documents which have been produced, and from the internal evidence of the copies themselves, I am satisfied that they are genuine and substantially accurate, they do not as a rule purport to be complete, and I think it would be rash to assume that they may not contain minor errors. The Hoarwithy fishboard referred to above has long since disappeared, although a local tradition of its former existence lingers. There is, in fact, a small piece of land still called the fishboard at Hoarwithy, upon which now stands an inn known as the New Harp. The custom or condition of local sale from the Hoarwithy fishboard is first referred to in the evidence in the extracts from the court rolls I have referred to. It is not mentioned in the extract of 1637; and it may be that the extract appearing in the *Hereford Journal*, purporting to be certified by Henry Fisher on March 18, 1639, dated the 24th of King Charles (probably a mistake for the 14th) is the first reference to it that appears upon the court rolls; but be that as it may, and whether the condition was attached to the ancient right of fishing from the first or not, or whether it was a regulation or by-law introduced by the freeholders themselves in a corporate capacity, it seems to me that the right of fishing and the condition as to sale at the Hoarwithy fishboard are separable, and that the breach of the latter would not involve the forfeiture of the former. It will be observed that the extract from the roll of 14th Charles I. speaks of the great court leet of the Most Noble Henry Earl of Kent and Elizabeth Countess of Kent, his wife, of the manor or hundred. It seems probable that the courts

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leet and baron in this hundred or manor of Wormelow were held together, and the higher title is not unnaturally adopted. The copy of the court roll of June 8, 1639, sets out a survey and perambulation of the manor and hundred of Wormelow. The boundaries of the part of the manor in question agree with another record of a perambulation appearing in an existing court roll of June 10, 1816; and the defendant George Harris in the witness-box, I think from genuine local and traditional knowledge, described them similarly. An undated letter, purporting to be signed by Alicia Clarke, a former lady of the manor who died in 1779, indicates that the lords of the manor of Wormelow claimed a right of fishing in the Wye within the manor. In 1822 there was a short, and I think inaccurate, presentment with regard to the free fishing to the effect that the freeholders adjoining the rivers Wye and Garren running through the manor have the right, &c. Sir Hungerford Hoskyns was at this time lord of the manor, and a Mr. Collins was the steward. Sir Hungerford Hoskyns was active in asserting a right to the fishery as lord of the manor, and, misled possibly by the above presentment, he endeavoured to limit the right of the freeholders so as to include only "brinkers," as they are called, that is, those whose lands adjoined the river. It is plain that at this time (about 1842) the right was being exercised, and not exclusively by brinkers, and Sir Hungerford Hoskyns failed to carry his point. It is true that on one occasion he obtained a conviction; but his brother magistrates were advised by counsel that the conviction was wrong, and refused to enforce the fines imposed without an indemnity from Sir Hungerford. Sir Hungerford himself in an earlier and unsuccessful prosecution seems to have been struck by the infirmity of his case against the free fishers as disclosed by the evidence of his steward, Mr. Collins. Taking the documentary evidence as a whole, I find in it nothing inconsistent with the right set up by the defendants. Indeed, I think it confirms the view that the modern user was in accordance with an ancient right. It is true that the parol evidence shews that free fishermen have occasionally employed men who were not themselves freeholders to assist them in their fishing. Assuming this to be in excess of the right as formulated

in the old presentments, I do not think it would be enough to shew that the modern user is not in exercise of the right the existence of which is indicated by the documentary evidence. I do not think it is necessary for the defendants to prove either that their land is held of the manor, or indeed that it ever was parcel of the manor. It is within the ambit of the manor; and in support of long user I think it is enough to say that it might have been freehold land or parcel of freehold land granted by the King when lord of the manor or hundred of Wormelow. Nor do I think that their claim involves the establishment of any title to the soil of the river. We know that there were weirs at Abbottarret's and Carey's Mills—indeed they were only removed when this part of the Wye was made navigable; but apart from these weirs I think the plaintiffs have not shewn title to any exclusive rights in this part of the Wye. If they had, I think the free fishermen's claim would still be established subject thereto. The defendants do not claim any exclusive right of fishing, or any right in the bed not incidental to their right of fishing. It seems to me, therefore, that it is immaterial whether the soil of the river is vested in the lord of the manor of Wormelow, as Sir Hungerford Hoskyns claimed, or in the riparian owners. In this connection I may say that I do not think demesne lands of a manor necessarily include lands other than those in the hands of the lord: see *Attorney-General* v. *Parsons*. (1) I think that the words "demesne lands" in the inquisition upon the death of Elizabeth Talbot taken in the 46th Edward III. must be read in a limited sense, having regard to the subsequent history of the manor. The plaintiffs contend that the freeholders within the manor of Wormelow are incapable of taking by grant, and consequently by prescription, and, further, that the right claimed cannot be appurtenant to land, inasmuch as it includes the right of taking fish for sale, and is not confined to the benefit of a house; and, moreover, that in any case it would be invalid as being destructive of the servient tenement. Now I think that a grant of a right to fish in common with the other freeholders within the manor would be a good grant to an individual, and might properly be

(1) 2 C. & J. 279, 308.

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presumed to have accompanied each original grant of a freehold. This was, I think, decided by Wills J. and Wright J. in *Chesterfield* v. *Fountaine* (1)—and see *Warrick* v. *Queen's College, Oxford* (2)—while, if necessary, a grant from the Crown incorporating the freeholders within the manor might, I think, in this case be properly presumed. In *Edgar* v. *Special Commissioners for English Fisheries* (3), Willes J. questions whether "an exclusive right to take all the fish in a navigable tidal river" for sale can be shewn on the ground, apparently, that such a right is incapable of being appurtenant to land. No case has been cited to me which has decided that the grant of a right to fish without stint appurtenant to land is bad in law, and I think *Goodman* v. *Saltash Corporation* (4) points the other way. The right of fishing in a river seems to me a right which may very properly and usefully pass with land in the immediate neighbourhood of that river, even though the fish are not wholly consumed upon it; and I cannot understand why a grant of such a right should not be valid. It is not a grant of all the fish in the river, if that be open to objection, for it is a grant of all that the grantee can catch, which, as every fisherman knows, is a very different thing. Now, if such a right can be granted at all, I see no reason why it should not be granted in common to the owners of several parcels of land, although the sub-division of the lands may lead to an indefinite increase in the number of persons entitled to exercise the right. So far as the suggested destruction of the servient tenement is concerned, there is little difference between an exclusive grant to one and a grant in common to several, since in the former case the grantee may employ as many persons as he pleases to fish for him. The fact that the right in question has been exercised for centuries, while the evidence shews that the fishing has much increased in value, puts difficulty in the way of the contention that such a right is destructive of the servient tenement. It may be observed that the exercise of the right is not likely to increase in these days, having regard to the high rate of charge for a fishing licence. I therefore arrive at the conclusion that I

(1) Post, p. 243.
(2) L. R. 6 Ch. 716.
(3) (1870) 23 L. T. 732, 737.
(4) 7 App. Cas. 633, 654.

ought to follow the decision of Wills J. and Wright J., and hold that the right claimed by the defendants is legally capable of proof, and, if so, in my opinion it is amply established by the evidence. I therefore dismiss the action with costs. I make no order upon the counter-claim, the other freeholders of the manor of Wormelow not being represented.

Solicitors: *R. S. Taylor, Son & Humbert, for Gwynne James & Son, Hereford; Meredith, Roberts & Mills, for E. L. Wallis, Hereford.*

H. L. F.

NOTE.

CHESTERFIELD *v.* FOUNTAINE.

THIS case is unreported. The judgments were delivered on January 21, 1895, and were as follows:—

WILLS J. I think this appeal must be dismissed. The magistrates have found that this claim is made bona fide; and that, therefore, we need not further discuss. The only other question is whether the claim is one which by law can be made. It may not have been put forward in very correct technical language before the magistrates, but we must not be nice about a matter of that kind if we see that in substance a right is claimed which is capable of existing and that there is some evidence about it. Now the right as it seems to me is capable of being claimed when it is expressed in proper phraseology. The allegation is that at some time or other, the epoch being lost in the mists of antiquity, the owner of the soil or bed of this river—the lord of the manor—granted to each of his freehold tenants the right to himself, his heirs and assigns, to fish in it. In the natural course of things, if such a grant as that were made, the freeholders who would enjoy the benefit of that grant might be multiplied; and, if the right were originally granted in respect of 50,000 acres or 100,000 acres, it might very well be that by the present time there would be 100,000 persons competent to exercise the right. A good deal of the argument on behalf of the appellant has rested, I think, upon the failure to observe the proper distinction between rights which are claimed by custom and rights which are claimed by prescription. A custom must be reasonable, and a custom which destroys the subject-matter of the grant would not be reasonable. A right claimed by prescription is subject to no limitation, as far as its use and reasonableness is concerned, and the owner of the soil, that is, the owner of the bed of the river, has a perfect right if he chooses, if the fishing belongs to him, to grant a right to fish to any number of persons although it may destroy his own right. Therefore the fact that the right may be exercised by an unlimited number of persons is not a circumstance that is fatal to the prescription. It is a circumstance to be taken into consideration when one comes to consider, as a matter of fact, whether the prescription is made out by the

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evidence, and in dealing with each question of course you would always be apt to take, as one of the circumstances making against the probability of it, the fact that it is capable of indefinite multiplication. That goes no further than its being a matter of observation on the evidence. It seems to me it was perfectly competent for the lord of the manor at the outset, or the owner of the freehold, being at the same time the owner of the bed or soil of this part of the river, the part upon which this so-called right is claimed—and nothing could prevent him from granting the right in question if he choose—to grant the right to the owners of a particular freehold and to their heirs and assigns. But then it is said, quite rightly, that there must be some evidence of that; and it is urged that it is necessary, in order to support an allegation of that kind, to prove by evidence that the defendant's predecessors in title have exercised the right, and of course in respect of the particular tenement of which he is now the owner. I do not think that that is at all necessary. I think that would be saying that a right of this kind, the exercise of which is necessarily a non-continuous one (it is not like the occupation of land), would be lost by a simple failure to exercise it when it was not convenient, apart from the Statute of Limitations. I do not think that that can be so at all. If you shew that there are a number of other persons exactly similarly situated with respect to the manor as this present defendant, and that they or a number of them have exercised the same right which is now claimed, that is evidence that the right belongs to all the tenants of the manor who are similarly situated. Here it seems to me there is some evidence. It is slight, no doubt, but there is some evidence. If this evidence were offered to a jury I do not think that the case would be withdrawn, or ought to be withdrawn, by any judge from the jury. He would tell them the evidence was very slight, and in all probability he would not think much of it himself, but he would not take upon himself to nonsuit, or direct a verdict for the defendant, as the case might be. There is a presentment of the manor put in, a presentment of the manor in 1815 which claims the right for all the riparian parishes. Inasmuch as this present defendant occupied land in a riparian parish, it does not matter whether that is the extent of the right claimed or proved, or whether it goes to the whole of the freehold tenements within the manor, and there is certainly some evidence that similar rights have been exercised by persons who have no other claim to fish in the places in which they were fishing than that they were freeholders of some of these riparian parishes. Under those circumstances it seems to me that there is some evidence, although it is slight. It is true that the evidence is chiefly that of persons who fished in boats. In this particular instance the defendant had stood on the gravel, by which it is clear is meant the soil of a portion of the space between the banks, which is part of the bed of the river and is often covered with water. This, however, is a summons for illegal fishing, and not for illegal trespass by standing on the bank, and therefore, whether the right was properly exercised by standing on the soil of a part of the bed of the river, or whether it ought to have been done from a boat, really does not arise. Therefore it seems to me that the magistrates were right, and that there was some evidence, though slight. In one sense I am rather sorry that one is

compelled to come to this conclusion, because it is obvious, without saying any more, that it is a right of such a kind and such a character that it would require extremely strong evidence to establish it, and it is one which may be really very difficult to establish, and one that has no chance of being established unless it is established by much more cogent evidence than that which has been admitted to be given in the present case. Still there is evidence, and we cannot decide on the question of fact. We have only to say whether the magistrates were right or wrong in abstaining from the inquiry. I think they could in this state of the evidence only have proceeded with the inquiry if they had supposed it was not bona fide, or if they were prepared against the law to try and decide the question of title.

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WRIGHT J. I am of the same opinion. The forcible arguments of the appellant's counsel will have all the chance of success that they ought to have in a civil proceeding; but we ought not to shut out the party proceeded against here from the possibility of his succeeding when the question is civilly tried.

CHEESE *v.* KEEN.

NEVILLE J. 1907 *Nov.* 18, 19, 20, 21, 26.

[1906 C. 524.]

Solicitor and Client—Solicitor-Mortgagee—Settled Accounts—Overcharges—Opening settled Accounts—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3.

K. was a builder, and from 1883 to 1904 employed C. as his solicitor, who financed him in numerous transactions. No bills of costs were delivered, but from time to time accounts were stated between them, and the amount due for loans, interest and costs was agreed, and C. took mortgages for the agreed amounts. By 1904 all the mortgages, except two, had been paid off, either by sales or by K. paying off and taking reconveyances of the mortgages, and on each occasion the amount due was agreed. In 1905 C. died, and in 1906 his executors brought an action against K. to enforce the two subsisting mortgages. K. counterclaimed for an account of all the transactions and dealings between himself and C. from 1883, alleging (as the fact was) that he had had no independent advice, and in some of the settled accounts he proved errors in respect of interest, and that he had been charged profit costs prior to the Mortgagees Legal Costs Act, 1895 (58 & 59 Vict. c. 25):—

Held, that K. was entitled to open all the accounts and to tax, surcharge and falsify, and that his right was not barred by the Statute of Limitations, although all the settled accounts but one had been agreed more than six years before the date of his counter-claim.

ACTION.

The plaintiffs were the executors of one Clement Cheese, a solicitor, who died in 1905, and sought to enforce two mortgages,

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both dated March 8, 1900, whereby the defendant conveyed certain properties in Market Street, Watford, by way of mortgage to Clement Cheese to secure the principal, interest, and costs therein mentioned. The plaintiffs also claimed payment of a sum of 50*l.*, being the balance alleged to be due on an equitable charge of other property. The defendant disputed the amount alleged to be secured by the two mortgages, and also denied that the 50*l.* was due; and by his amended counter-claim alleged that throughout the transactions mentioned in the statement of claim and in some seven other matters Clement Cheese acted as his solicitor and financed him in his business as a builder, making him advances from time to time which were afterwards included in mortgages; that no bills of costs or proper accounts were ever delivered; that he never had any independent advice with reference to the said transactions; that the plaintiffs alleged that all accounts between himself and Clement Cheese (except those mentioned in the statement of claim) had been settled, but that, if he had agreed or signed any account, he had agreed and signed the same while Clement Cheese was acting as his solicitor, and upon his advice and representation that the same were correct; and that in consequence of the influence which Clement Cheese had over him the settled accounts were incorrect. The plaintiffs in reply relied on the settled accounts, and set up the Statute of Limitations. At the trial it was conceded that, subject to an error of 100*l.* that the defendant proved, the plaintiffs were entitled to the usual foreclosure judgment; and the main question was whether the defendant was entitled under his counter-claim to open the settled accounts. It appeared from the particulars furnished by the plaintiffs that there had been numerous transactions between the defendant and Clement Cheese in relation to some seven properties (other than the Market Street properties) extending from 1883 to 1904. The general nature of such transactions was that loans were made to the defendant and money was paid on his account, such loans being either at the time they were made or subsequently secured by mortgage. Such mortgages comprised sometimes a single advance, but more often several prior advances and also moneys owing by the defendant in respect of payments made on his

account, and interest on advances and costs. From time to time statements of account were made out and signed or verbally agreed by the defendant, and the balances thereby appearing, if in his favour were paid to him or carried forward, or if against him were secured by mortgages. All these mortgages had been either sold or paid off and reconveyed, the defendant on each occasion agreeing the amount due. The plaintiffs relied upon all these mortgages and also upon all the reconveyances as settlements of account in respect of the matters contained in them. The other material facts sufficiently appear in the arguments and judgment.

Jenkins, K.C., and *Beddall*, for the defendant on his counterclaim. The accounts shew that in the case of several of the mortgages sums are charged for interest, afterwards capitalized, which are grossly inaccurate, and lump sums are charged for costs, including profit costs, which, before the Mortgagees Legal Costs Act, 1895, a solicitor could not charge when he himself was the mortgagee: *In re Roberts* (1); *In re Wallis*. (2) That is sufficient to open these settled accounts. In cases of solicitor and client, and of other persons in fiduciary relations, the Court takes an entirely different view of settled accounts to that which it takes in the case of ordinary commercial relations. Where the relations are fiduciary, proof of some errors is enough to open a settled account: *Lewis* v. *Morgan* (3); *Lawless* v. *Mansfield* (4); *Todd* v. *Wilson* (5); and the remedy is to open the account, not merely to surcharge and falsify: *Williamson* v. *Barbour* (6); nor is it necessary in the case of fiduciary relations to shew fraud: *Gething* v. *Keighley* (7); *Ward* v. *Sharp*. (8) [They also referred to *Cockburn* v. *Edwards* (9); *In re Webb* (10); *Eyre* v. *Wynn-Mackenzie*. (11)]

Upjohn, K.C., *Peterson, K.C.*, and *Dunham*, for the plaintiffs.

(1) (1889) 43 Ch. D. 52.
(2) (1890) 25 Q. B. D. 176.
(3) (1795) 3 Anst. 769; on appeal, sub nom. *Morgan* v. *Evans*, (1834) 3 Cl. & F. 159.
(4) (1841) 1 D. & War. 557.
(5) (1846) 9 Beav. 486.
(6) (1877) 9 Ch. D. 529.
(7) (1878) 9 Ch. D. 547.
(8) (1884) 53 L. J. (Ch.) 313.
(9) (1881) 18 Ch. D. 449.
(10) [1894] 1 Ch. 73.
(11) [1894] 1 Ch. 218.

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The subject-matter of the counter-claim is limited to the matters in the particulars given by the plaintiffs, and with respect to these matters we have either signed settled accounts or agreed accounts, some of them going back twenty years, which have never been objected to. The authorities cited may be divided into two classes. One is where the solicitor, besides being solicitor-mortgagee, is also the agent of the client to collect rents or other moneys, or otherwise is the agent to receive moneys for his client, and therefore he is accountable as an agent to his principal. That is not this case. Here it is said Keen made payments for interest and costs and Cheese has been overpaid. That is a claim for money had and received to the use of the client, and therefore *Lewis* v. *Morgan* (1) and that class of cases do not apply. The other class of cases is where there are subsisting mortgages created by the client in favour of his solicitor, and either the solicitor seeks to realize or the client claims to redeem, and then a question arises as to what is due under the security. The Market Street mortgages are within this class, but they are not included in the relief sought by the counter-claim. There is no reported case like the present. Here all the mortgages but one were paid off and the accounts settled more than six years before the date of the counter-claim. This is an ordinary case of two parties dealing with each other as principals, as borrower and lender, and any right of action by one against the other is subject to the Statute of Limitations, i.e., six years from the date when the right of action accrued. The important date is not when the mortgages were paid off, but when the interest and costs were by agreement deducted from the advances. The principle of *Mainland* v. *Upjohn* (2) and *Potter* v. *Edwards* (3) applies, and in the absence of fraud the statute applies: *In re Hindmarsh* (4); *In re Lee.* (5) Fraud is not suggested here; relief is claimed only on the ground of mistakes in the settled accounts. But settled accounts are only opened on the ground of mistake when serious errors are proved. Here only two cases

(1) 3 Anst. 769; on appeal, sub nom. *Morgan* v. *Evans*, 3 Cl. & F. 159.
(2) (1889) 41 Ch. D. 126, 143.
(3) (1857) 26 L. J. (Ch.) 468.
(4) (1860) 1 Dr. & Sm. 129.
(5) (1868) L. R. 4 Ch. 43.

of overcharge of interest are proved ; the rest are in respect of profit costs. Admitting that profit costs could not be charged prior to the Mortgagees Legal Costs Act, 1895, that Act was passed to meet cases like *In re Roberts* (1) and *In re Wallis* (2), and only deals with mortgagees' costs, and does not touch mortgagors' costs which a solicitor under the Solicitors' Remuneration Act, 1881, and the scale of costs thereunder, can charge his client. There is nothing to prevent a man from employing a solicitor-mortgagee to act as his solicitor, and then the solicitor is entitled to charge him also with mortgagor's costs, assuming, of course, the retainer. Here Cheese could have charged Keen with the scale fee for mortgagor's costs, and Keen could not now have disputed it: *In re Frape* (3); *In re Van Laun* (4); and the amount of these undercharges, if allowed, would practically balance the disputed items. Lastly, this is not a case of gross impropriety, and the defendant has put forward his claims after the death of Cheese. They are, in fact, in the nature of stale demands, and should not be allowed.

Jenkins, K.C., in reply.

[Neville J. I only wish to hear you on the Statute of Limitations.]

The fallacy of the plaintiffs' argument is this: The defendant is claiming relief in equity. The statute does not apply to accounts in equity, but the Court of Chancery has in many cases applied the analogy of the statute. Here, if the defendant fails to set aside the settled accounts, they stand, and the analogy of the statute is not required. If he succeeds in setting aside the accounts, there is nothing for the analogy of the statute to operate upon, because it is a running account: *Betjemann* v. *Betjemann* (5); *Friend* v. *Young*. (6)

Cur. adv. vult.

Nov. 26. Neville J. One Cheese, a solicitor, in or about the year 1883, commenced, and for some years continued, to finance the defendant Keen, who is a builder, in his building

(1) 43 Ch. D. 52.
(2) 25 Q. B. D. 176.
(3) [1893] 2 Ch. 284.
(4) [1907] 1 K. B. 155.
(5) [1895] 2 Ch. 474.
(6) [1897] 2 Ch. 421.

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operations. Keen was unrepresented by any other solicitor, and Cheese took charges and mortgages upon the properties acquired and built upon by the defendant, to secure the amount of his advances, and interest, costs and expenses. From time to time accounts were submitted to the defendant shewing how the amounts for which the securities were taken by Cheese were made up, and these were signed or approved by the defendant. Cheese died in 1905. At the time of his death all the mortgages, with the exception of the mortgages of the property in Market Street, had been satisfied, so far as he was concerned, and transfers or reconveyances executed. The plaintiffs in the action, who are the executors of Cheese, seek foreclosure of the last-mentioned mortgages. The defendant by way of counter-claim claims an account of all dealings and transactions between himself and Cheese, to which claim the plaintiffs raise the defence of settled accounts. At the trial the defendant was desirous of making a case for opening the accounts, but I held that upon the pleadings as they stood this could not be done, and, the defendant desiring to amend his counter-claim, it was directed to stand over for that purpose, but judgment for foreclosure was given upon the plaintiffs' statement of claim. The counter-claim now comes on for trial upon amended pleadings. The settled accounts which are impeached are set out in the plaintiffs' particulars, but by mutual consent the accounts relating to the properties in Paddock Road and Marlborough Road are withdrawn from consideration. It is proved that, in the accounts laid before the defendant, Cheese habitually charged profit costs in respect of the mortgages to himself; and this, prior to the Act of 1895, he was not entitled to do. In other respects, there is no evidence to shew that the costs charged were exorbitant or oppressive. No bills of costs were ever rendered, and, except so far as the settled accounts are evidence of agreement, no agreement was ever come to with regard to the costs. Keen left Cheese to make what charges he thought proper, and never did, and I think never was in a position to, contest them. In my opinion, moreover, no agreement with regard to mortgagees' costs would have bound Keen, unless he had been informed that Cheese was not entitled to claim profit costs. It is not suggested that

Cheese ever told him that this was so, and I think he did not know it. There are in addition several instances of interest overcharged, representing a substantial sum. Fraud is not alleged, and I think the overcharges were in error; but the mistakes are uniformly in favour of the mortgagee, and I think indicate that Keen's interests did not receive from Cheese the care and protection which he would have given to those of a client where he himself was not an interested party. In considering whether the overcharges are sufficient to entitle the defendant to have the accounts set aside or rectified, due weight must be given to the fact that the fiduciary relation of solicitor and client existed between Cheese and the defendant. How far the Court will open accounts upon proof of error appearing in some but not all of them must depend upon the circumstances of the particular case, and I think that where the relation subsisting between the parties, the character of the errors, and the connection of the accounts, lead to the inference that the errors proved in some cases may be expected to appear in all, there the Court should give relief in respect of all. In my opinion in the present case, having regard to the relation between the parties and the nature of the errors proved, the defendant is entitled to relief in respect of all the accounts, but the justice of the case will in my opinion be met by the liberty to tax and to surcharge and falsify contained in the order which I propose to make. I cannot assent to the argument that a solicitor making advances to his client, and taking securities for payments to and on account of the client, and for costs and expenses incurred about his affairs, no other solicitor intervening on behalf of the client, is not under an obligation to furnish accounts to his client unless he can be shewn to have received money as his agent. It is the business of an attorney to keep his client's accounts: see *Matthews* v. *Wallwyn* (1); and a client who, like the defendant in the present case, had trusted implicitly in his solicitor would be in a singularly defenceless position if the Court were to hold that under such circumstances a solicitor is entitled to deal with his client at arm's length and to refuse to render an account of the transactions which he had carried through on behalf of his client as well as of himself.

(1) (1798) 4 Ves. 118, 125.

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With regard to the time within which the client must assert his rights to obtain, or in cases of error to open, an account, a series of cases, of which *Lewis* v. *Morgan* (1) and *Lawless* v. *Mansfield* (2) are examples, shews that such time is not limited to six years or any other definite period. The reason is possibly to be found in the domestic jurisdiction exercised by the Court over its officer: see *Lewis* v. *Morgan* (1), where it is laid down that an attorney is accountable to the Court as well as to the party. However that may be, the point is, I think, settled by indisputable authority. In my opinion it was rightly decided in *Eyre* v. *Wynn-Mackenzie* (3) that a mortgagee-solicitor's inability to charge profit costs extends to costs charged as mortgagor's costs. It is laid down in *Lawless* v. *Mansfield* (2) that a solicitor is not at liberty to act in a matter relating to his own benefit as the solicitor for both parties, and I think the denial of profit costs to a solicitor-mortgagee does not rest exclusively upon the ground stated in *In re Roberts.* (4) The point, however, owing to the passing of the Act of 1895, becomes of minor importance. It appears to me that the cases I have referred to are quite consistent with the decision in *In re Hindmarsh* (5) that the Statute of Limitations applies to the case of a solicitor receiving money for his client. In that case the solicitor was not dealing with his client for his own benefit. I may also say in this connection that the case of *Mainland* v. *Upjohn* (6) seems to me to deal merely with the question of clogging an equity of redemption, and the relation of solicitor and client, if it existed, does not seem to have been alleged or relied upon. For my part, I should hesitate to apply the doctrine of notional payment, no doubt properly resorted to in that case, so as to make time run against a claimant who had not in fact paid the money. The decision in *White* v. *Lady Lincoln* (7), the principle of which is by *In re Lee* (8) confined to cases where the solicitor is also general agent, does not appear to me to bear upon the present case. It has been

(1) 3 Anst. 769; on appeal, sub nom. *Morgan* v. *Evans*, 3 Cl. & F. 159.
(2) 1 D. & War. 557.
(3) [1894] 1 Ch. 218.
(4) 43 Ch. D. 52.
(5) 1 Dr. & Sm. 129.
(6) 41 Ch. D. 126.
(7) (1803) 8 Ves. 363.
(8) L. R. 4 Ch. 43.

decided by those cases that where a solicitor, who is also a general agent, cannot account it will be assumed against the solicitor that his costs have been paid. The order that I make is that the defendant be at liberty to surcharge and falsify the accounts alleged in the plaintiffs' particulars (not relating to the Paddock Road and Marlborough Road properties) and to have taxation of the costs charged in such accounts upon the footing that Cheese was not entitled to charge profit costs in respect of any mortgages prior to the passing of the Act of 1895, regard being had in any such taxation to any agreement as to costs subsequently appearing by such accounts to have been come to between Cheese and the defendant—the plaintiffs to pay the costs of the counter-claim not otherwise provided for up to and including the trial thereof with set-off; further consideration to be reserved with liberty to apply. The above directions will apply to the accounts of the Market Street properties. Should any over-payments appear to have been made under the judgment in the action owing to the form in which the account was directed, it will have to be provided for when the counter-claim is dealt with on further consideration. But before I part with the case I want to say this, that it seems to me a case in which, if the parties are reasonable, they ought to agree a figure without going into the expense of lengthy accounts. I think the defendant ought to bear this in mind, that he is put in a position, owing to the application of a rule of the Court, of having had his work done for him by Cheese for nothing, and that was not intended by him, and was not, I am sure, intended by Cheese, but of course the Court must strictly enforce the rule that existed at that time. I think he was honest when he said in the box that he intended to pay what is right, and I think that ought to be borne in mind if the parties come to any terms.

Jenkins, K.C. Certainly, my Lord, it shall be borne in mind.

Solicitors: *Wallington, Fabian & Co.; Tarry, Sherlock & King.*

H. L. F.

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Nov. 25, 26, 27; *Dec.* 5.

PONSOLLE *v.* WEBBER.

[1906 P. 2653.]

Mortgage—Stock Exchange—Pledge of Shares by Broker with Jobber against Settling Day—Outside Principal—Default in payment of Loan—Transaction closed under Stock Exchange Rules—Subsequent sale of Shares—Liability of Jobber to account as Mortgagee.

Brokers on the Stock Exchange, acting for an undisclosed outside principal, pledged share certificates with a jobber on the exchange as security for a loan to be repaid the next settling day. The outside principal failed to put the brokers in funds to repay the loan, whereby the brokers made default and were hammered, and the jobber, under the rules of the Stock Exchange, was obliged to take over the shares at the official price of the day. Afterwards the shares rose in the market, and the jobber sold them at a profit, and was then sued by the outside principal for an account of the proceeds of sale on the footing that he was only mortgagee of the shares:—

Held, that the relation of mortgagor and mortgagee existed between the outside principal and the jobber; that the Stock Exchange Rules did not apply as between them; and that the jobber was bound to account and, after deducting his principal, interest and costs, to pay over the surplus proceeds of sale to the mortgagor.

ACTION.

On July 16, 1906, the plaintiff, who carried on business as an outside stock and share dealer under the style of Montmorency & Co., and had purchased through Tracy, Fox & Co., brokers on the Stock Exchange, 7000 fully paid-up shares of 1*l.* each in Lloyd's Copper Company, Limited, employed Cancellor & White, brokers on the Stock Exchange, as his agents to procure for him from the defendant, a jobber on the Stock Exchange, a loan of 3400*l.* upon the said shares. The defendant knew that Cancellor & White were acting for an undisclosed principal, and the arrangement was that the value of the shares was to be taken at 10*s.* each, and that the 3400*l.* was to be repaid on July 27 with 6 per cent. interest and a commission, and the defendant, before agreeing to make the loan, insisted that the share certificates should be deposited with him, and that the shares should be sold for the end-July account, July 28. Cancellor & White

accordingly sold the shares at 10*s.* each for the end-July account to Tracy, Fox & Co., who were acting for a client, and informed the defendant of the sale. On July 27 the defendant tendered the shares to Tracy, Fox & Co., who made default and were hammered; and on July 28 Cancellor & White, in consequence of the plaintiff having failed to put them in funds to repay the loan, also made default and were hammered. The result was that the defendant was obliged, under rules 152 and 160 of the Stock Exchange Rules, 1906 (1), to take over the shares at 8*s.* per share, that being the official price fixed by the official assignees, and subsequently he caused his name to be registered in the books of the company as the holder of the said shares. Afterwards Cancellor & White paid the defendant the difference between the 8*s.* and 10*s.* per share and were reinstated on the Stock Exchange. Subsequently the shares rose in the market, and the defendant sold them all and realized a profit of about 1600*l.* Thereupon the plaintiff commenced this action in December, 1906, and by his statement of claim alleged that the defendant had wrongfully retained the said shares as his own property, and was not entitled, after satisfying his loan and interest and commission, to retain the profit of 1600*l.*; and the plaintiff claimed—(1.) a declaration that the defendant from July 16, 1906, until the realization thereof held the said shares by way of

(1) Rule 152: "In every case of failure, the official assignees shall publicly fix the prices current in the market immediately before the declaration, at which prices all members having accounts open with the defaulter shall close their transactions by buying of or selling to him such securities as he may have contracted to take or deliver, the difference arising from the defaulter's transactions being paid to, or claimed from, the official assignees."

Rule 160: "In the case of a loan of money made upon securities valued at less than the market price, the lender shall realize his securities within three clear days, unless the creditors consent to a longer delay, or take them at a price to be fixed by the official assignees, with appeal to any two members of the committee. Should the security be insufficient, the difference may be proved against the defaulter's estate."

These two rules form part of a set of rules, numbered 147 to 166, under the heading "Failures," in the Stock Exchange Rules, 1906, which incorporate the set of rules, numbered 174 to 181, published under the heading "Official Assignees," in previous editions of the Stock Exchange Rules.

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security only for repayment of the said loan and interest and commission; (2.) an account of the proceeds of the said realization; and (3.) payment by the defendant of the said proceeds after satisfying his said security. The defendant pleaded that on the failure of Cancellor & White to fulfil their said contract with him he was compelled, in accordance with the usage and the rules of the Stock Exchange (which were well known to the plaintiff), to take the said shares at 8*s.* a share, being the price fixed officially as the fair current price on the Stock Exchange, and to hold the same for his own absolute use. It appeared from the evidence that defendant did not know that the plaintiff was the undisclosed principal of Cancellor & White until shortly before the commencement of the action, nor did he know until the trial of the action that the plaintiff was also the undisclosed principal of Tracy, Fox & Co., through whom the plaintiff had in fact purchased the shares in the first instance.

Atkin, K.C., and *Waggett*, for the plaintiff. When Cancellor & White and Tracy, Fox & Co. failed, the transaction had to be closed under the Stock Exchange Rules, and it was closed under rules 152 and 160. But these rules only apply between members of the Stock Exchange, and do not affect the rights and liabilities of an outside principal: *Levitt* v. *Hamblet.* (1) Therefore the rights of the plaintiff remained unaffected, and the relation between him and the defendant was and is that of mortgagor and mortgagee, and he is entitled to the usual account of the proceeds of sale of the shares. He is willing to indemnify Cancellor & White against the loss they have sustained.

Jenkins, K.C., *Rufus Isaacs, K.C.*, and *H. C. Bischoff*, for the defendant. The contract between Webber and Cancellor & White, as the plaintiff's agents, was made subject to the rules of the Stock Exchange; that means that Webber was to have all the advantages and be subject to all the liabilities created by the rules. The intention of the parties, including the principal, was that, if broker did not pay and principal did not pay, the matter should be closed according to the Stock Exchange Rules. By sending an agent to make a contract in these terms the principal

(1) [1901] 2 K. B. 53.

has adopted the rules for the purpose of this contract. *Lomas* v. *Graves & Co.* (1), following *Richardson* v. *Stormont, Todd & Co.* (2), shews that the rules of the Stock Exchange are binding on outsiders in so far as they affect an assignment of all a defaulting broker's property to the official assignee. A principal who gives an agent power to borrow on securities is bound, though the agent exceeds the limits fixed by his instructions: *Brocklesby* v. *Temperance Permanent Building Society* (3); so here the plaintiff is bound by the contracts Cancellor & White made with the defendant and with Tracy, Fox & Co. A broker is entitled to be indemnified by his principal against loss caused by the principal's default: *Duncan* v. *Hill* (4); and if the principal becomes insolvent or fails to put the broker in funds to pay the sum due by him for differences or for shares, the broker is entitled to close the transaction and sell out the shares: *Lacey* v. *Hill* (5); *Davis & Co.* v. *Howard.* (6) It is submitted that the same principle applies to a transaction of loan, and that when a principal makes default and causes his broker to fail, he is not entitled afterwards to take advantage of his default. Here, when the brokers failed, the only way to close the transaction was a sale of the shares under rules 152 and 160, and the plaintiff must be taken to have contracted subject to those rules. The sale was in effect made by the official assignee to the defendant at the official price of the day, and the plaintiff cannot be heard to say that he is not bound by the rules when it was his own default that caused the sale.

Neville J. This action raises what is really a short point, and that is, whether or no the set of Stock Exchange Rules of 1906, under the heading "Failures," of which rules 152 and 160 form part, apply to principals not members of the Stock Exchange, or whether they are limited in all cases to the relations of the members of the Stock Exchange inter se. Now it has been decided that where the outside principal has performed his duty, these rules regulate the relations of the members of the

(1) [1904] 2 K. B. 557.
(2) [1900] 1 Q. B. 701.
(3) [1895] A. C. 173.
(4) (1873) L. R. 8 Ex. 242, 248.
(5) (1874) L. R. 18 Eq. 182.
(6) (1890) 24 Q. B. D. 691.

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Stock Exchange inter se, and have no effect on the principal who stands behind the Stock Exchange transaction. But it is argued on behalf of the defendant, that where the principal has failed to fulfil his duty towards the member of the Stock Exchange, these rules are incorporated into the contract and are binding on the outside principal, as well as the members of the Stock Exchange. I do not think that is so. The question really is, whether the contract impliedly incorporates these particular rules or whether it does not? I think the decisions which have been cited shew that these rules were not intended to affect anybody but members of the Stock Exchange, and, if that is so, I do not see how the original contract can be affected by the question whether or no the principal put the broker, the member of the Stock Exchange, into funds to meet his obligations at the time of the account. Of course, unless these rules are incorporated into the contract, the relation of the outside principal, and the broker or jobber, as the case may be, must be determined by the general law of the land. Holding, as I do, that these rules are not applicable to the present case, notwithstanding the fact that Cancellor & White were not put in funds by the plaintiff to fulfil their obligations at the account, I have to consider what, apart from these rules, is the law regulating the transaction. Now there is no rule in equity stronger than this, that a mortgagee can take nothing by his security beyond his principal, interest and costs; and by no means that I know of, other than foreclosure, can he ever make himself master of the property which comes into his possession as mortgagee for the purpose of securing the advance made by him. It is also perfectly clear that that relation of mortgagor and mortgagee is not altered by the fact that the mortgagor, at the time when the debt is payable, fails to make the proper payment. Consequently, in the absence of foreclosure, by no process could the mortgagee, the defendant, ever make these shares pledged to him his own property; and therefore, on the sale of the shares, he is bound to account to the mortgagor, and, in case he has realized more than sufficient to pay the principal, interest and costs due to him, he is bound to hold the balance for the mortgagor. The result is that accounts must be taken

between the parties in the usual way. I think the order should be prefaced by a declaration that the defendant holds the shares as mortgagee; then there must be an account of what is due to him for principal, interest and costs, these costs to include his costs of this action except so far as they have been increased by his claim to hold the shares as his own property. On the other hand, he must account for what he has received on the sale of the shares, and further consideration will be reserved with liberty to apply.

Solicitors: *Osborn & Osborn; Bischoff & Co.*

H. L. F.

CABLE *v.* BRYANT.

[1906 C. 3596.]

Air—Easement—Nature of Right—Derogation from Grant—Obstruction.

A right to the access of air to a defined aperture over a servient tenement may be acquired though there is no defined channel over the servient tenement through which the air flows.

The grant of such a right may be implied from general words in a conveyance of a building from a grantor entitled in fee to the adjoining land though such land is subject to a lease.

On January 19, 1905, the H. Company conveyed to the plaintiff in fee a piece of land with a stable on it. The stable was ventilated by apertures to which the air had access over an open yard which the company owned in fee subject to a lease for a term of which twenty-eight years were unexpired. On August 3, 1905, the company conveyed the yard to the defendant, the lessee joining to merge the term. The defendant put up a hoarding entirely closing the ventilators of the stable:—

Held, on the principle of derogation from a grant, that neither the company nor the defendant as their assignee could erect anything on the yard which prevented the use of the stable as a stable. A mandatory injunction granted to remove the hoarding.

THE plaintiff in this action was a jobmaster carrying on business in St. Albans. He owned and occupied for the purpose of his business a stable situate in Adelaide Street, St. Albans, bounded on the east or south-east by a yard belonging to the defendant, which was, until the acts complained of, open and unbuilt upon. In the wall of the stable adjoining the defendant's

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yard there were two windows or ventilators, nine inches in height and 2 ft. 9 in. long, through which light and air reached the interior of the stable. In April, 1906, the defendant erected a hoarding in his yard close to the plaintiff's stable wall, entirely closing the ventilators.

The plaintiff brought this action for an injunction against the defendant permitting this hoarding to remain, or otherwise obstructing the access of light and air to the said windows or ventilators.

The claim was founded on the principle of derogation from grant. The Hatfield and Harpenden Breweries Company were on January 19, 1905, the owners in fee of the plaintiff's stable and of the defendant's yard, and by an indenture dated that day, and made between the company of the one part and the plaintiff of the other part, in consideration of the sum of 180*l.* the company conveyed the stable in question to the plaintiff, his heirs and assigns, by the description of "All that piece of land situate in the parish of St. Peter in the city of St. Albans in the county of Hertford abutting on Adelaide Street on the south-west side thereof together with the brick built stable having a corrugated iron roof then standing on the said piece of land and in the occupation of the purchaser."

At the date of this conveyance the company were owners in fee of the defendant's premises, subject to a lease of thirty-four years less ten days from Christmas, 1899, then vested in Messrs. Glover & Co.

By an indenture dated August 3, 1905, the company conveyed the defendant's premises to him in fee, Messrs. Glover & Co. joining in the conveyance to merge their leasehold interest.

A former action had been brought by the plaintiff claiming the same relief on the ground of prescriptive right to the access of light and air. In the first action the defendant had put in a counter-claim for damages for nuisance from the stench escaping from the stables through the ventilators in question. The plaintiffs had discontinued the first action, and an order had been made that the counter-claim should come on for trial together with the second action, but the two were argued separately.

Peterson, K.C., and *Whitmore Richards*, for the plaintiff. The law as to derogation from grant is that an owner who conveys a house or building, being at the time the owner in possession of adjoining land, cannot do anything upon that land which prevents the enjoyment of the house or building for the purposes for which it was granted. If the adjoining land lie in lease the grantor cannot of course prejudice his lessee, but the land is bound by his grant, subject only to the rights of the lessee, and on the expiration of the lease the purchaser has the same rights as if the lease had never existed.

Aldin v. *Latimer Clark, Muirhead & Co.* (1) shews that this doctrine applies to an obstruction of the access of air to defined apertures in the building granted. *Coutts* v. *Gorham* (2) and *Davies* v. *Marshall* (3) establish the proposition that the existence of a lease does not prevent the application of the doctrine. In this case the lease which existed at the date of the conveyance came to an end in 1905, and it is therefore no defence to the action.

Jenkins, K.C., and *Beddall*, for the defendant. The plaintiff in this case must rely upon a grant to him in his conveyance. He cannot rely upon any obligation thrown on the grantor by way of implied covenant or by the doctrine of derogation from grant, which is, we submit, an obligation of the same nature, because that would only bind assignees with notice, and the defendant is clearly a bona fide purchaser without notice. There are no words in the plaintiff's conveyance expressly giving a right to air, and the right given by general words, whether expressed before the Conveyancing Act, or, as in this case, implied by that Act, is clearly limited to such rights as the conveying party could grant at the time of conveyance: *Booth* v. *Alcock* (4); *Godwin* v. *Schweppes, Ld.* (5); *Quicke* v. *Chapman*. (6)

The easement of access of air claimed could not have been granted because—(1.) there can be no grant of an easement of air except through a defined passage over the servient tenement: *Webb* v. *Bird* (7); *Bryant* v. *Lefever* (8); *Harris* v. *De Pinna*. (9)

(1) [1894] 2 Ch. 437.
(2) (1829) Moo. & M. 396.
(3) (1861) 1 Dr. & Sm. 557.
(4) (1873) L. R. 8 Ch. 663.
(5) [1902] 1 Ch. 926.
(6) [1903] 1 Ch. 659.
(7) (1863) 13 C. B. (N.S.) 841.
(8) (1879) 4 C. P. D. 172.
(9) (1886) 33 Ch. D. 238.

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In *Bass* v. *Gregory* (1) the right was established, but it was for the ventilation of a cellar by the access of air through a pipe into a disused well, and, as Pollock B. says, "If ever there was a case of the access of air to premises through a strictly defined channel this is that case." In *Hall* v. *Lichfield Brewery Co.* (2) Fry J., adopting the language of Littledale J. in *Moore* v. *Rawson* (3), says distinctly that any right to air must be founded on implied covenant. The judgment of Littledale J. was commented on in *Dalton* v. *Angus*. (4)

(2.) There can be no grant of an easement in reversion. Such an easement is unknown to the law; and even if such a grant were possible the existence of the lease would be a circumstance to be taken into account in construing the meaning of general words, and would prevent the grant of such an easement being implied. Some right may be obtained by the grantee when there is a lease, but it must be a right in the nature of an implied covenant. *Coutts* v. *Gorham* (5) and *Davies* v. *Marshall* (6) may both be explained on this ground, for the defence of bona fide purchaser without notice could not have been raised in either case.

NEVILLE J. The point that I have to decide at the moment is whether where a man grants a stable, the land adjoining to which he owns, but it is in the occupation of a lessee from himself, and subsequently a grant is made of the neighbouring land and the lease is merged in the fee, there is any obligation on the part of the grantee of the adjoining land not to interfere with the reasonable use of the stable for the purposes of a stable for which it was granted. Now, supposing that the adjoining land had been in the occupation of the grantor and not of the lessee under him at the time of the original grant, it seems to me that there could be no question about it. I think that the question of whether any difference is made by the fact of the adjoining land being at the time of the grant in the occupation of the

(1) (1890) 25 Q. B. D. 481, 483.
(2) (1880) 49 L. J. (Ch.) 655.
(3) (1824) 3 B. & C. 332; 5 D. & Ry. 234.
(4) (1881) 6 App. Cas. 740, 794.
(5) Moo. & M. 396.
(6) 1 Dr. & Sm. 557.

lessee is concluded by two cases which have been cited to me. The first is *Coutts* v. *Gorham* (1), and the second, a decision of Kindersley V.-C., is *Davies* v. *Marshall.* (2) Those cases seem to me to be in point, but certain arguments have been addressed to me to which I think I ought to refer.

It has been said, first of all, that the right to air is different in its nature from the right to light, and cannot be granted as an easement at all. Secondly, it is said that, inasmuch as an easement cannot be granted in reversion, therefore where a grantor is not in possession of the adjoining land no obligation can be imposed upon him with regard to interference with property granted, except upon the presumption or implication of a covenant by him not to interfere with the enjoyment. Then it is said that, if that be the true ground which imposes upon the grantor the obligation of non-interference, that cannot affect a purchaser without notice, inasmuch as the covenant would not run with the land, and the doctrine of *Tulk* v. *Moxhay* (3) would have to be relied upon. Now with regard, first of all, to the question of the right of air, cases have been cited shewing that a general right to air cannot be acquired by prescription, and it is suggested—and I think has been suggested in some of the cases—that even where a right to air has been enjoyed through a particular aperture in the house or other dominant tenement an easement with respect to air cannot be acquired. That seems to have been thought to be the case by Fry J. in the fairly recent case of *Hall* v. *Lichfield Brewery Co.* (4), in which he refers to the proposition of Littledale J. supporting his view. Now I think that the cases that I have referred to and the case of *Aldin* v. *Latimer Clark, Muirhead & Co.* (5) are authorities to the contrary, and I think, also, one must not lose sight of the observations of Lord Selborne in the case of *Dalton* v. *Angus* (6 in the House of Lords. It appears to me that in its result there is no distinction between the acquisition of a right to light and of a right to air. The measure of interference with light and with air which entitles the plaintiff to relief of course may differ

(1) Moo. & M. 396.
(2) 1 Dr. & Sm. 557.
(3) (1848) 2 Ph. 774.
(4) 49 L. J. (Ch.) 655.
(5) [1894] 2 Ch. 437.
(6) 6 App. Cas. 794.

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to a very considerable extent, but it appears to me that both the right to light and the right to air through a particular aperture in a house or building on the dominant tenement is capable of being acquired by prescription.

Now it is next said that, however that may be, there could not be a grant in the present case, because you cannot have a grant of an easement in reversion, and the adjoining property was not in possession of the grantor at the time of the grant. I think it is a question, as has been put by the plaintiff, of derogation from grant. I think that the rule that a man may not derogate from his grant is a rule of law, and not a rule of equity at all. I do not think it depends upon an implication of a covenant on the part of a grantor. I think it is quite clear that the obligation not to derogate from a grant applies to a person deriving title from a grantor in the same way as it applies to a grantor himself; and it seems to me that that is conclusive upon the point of whether the rule depends on the implication of a covenant or whether it does not, because if it depends upon the implication of a covenant it is only those who take with notice of a covenant who would be subject to the obligation, and that would be an equitable obligation, and not a legal obligation, which I believe the obligation not to derogate from a grant to be.

With regard to that point, I may refer to the case of *Quicke* v. *Chapman* (1), which has been cited for a somewhat different purpose. I think, looking at Romer L.J.'s judgment there, that he considered the question of implication of a covenant to be quite distinct from the question of derogation from grant, because he says (2) : "In fact, the defendant was not in that position ; he had entered into no such covenant, expressed or implied. And, indeed, the counsel for the plaintiffs did not attempt to base their case on such a covenant. They based their case on the doctrine that a grantor shall not derogate from his own grant." Thus he draws a distinction between the obligation resulting from an implied covenant on the part of the grantor and the doctrine which, I think, as I said before, to be a legal doctrine, that the grantor may not derogate from his grant. It appears to me, therefore, that,

(1) [1903] 1 Ch. 659. (2) [1903] 1 Ch. 669.

both upon principle and authority, it is clear that where a man grants a stable, even though the adjoining premises at the time may be under a lease from him to somebody else, he and any person claiming through him by subsequent grant is subject to the obligation imposed by the rule, and cannot derogate from the grant he has made by any act which shall render the subject of the grant unfit from a reasonable point of view for the purpose for which it is granted.

Solicitors: *Clifford Turner & Hopton; Wallington, Fabian & Co., for Wallington, Fabian & Co., St. Albans.*

J. R. B.

LLOYD *v.* PRICHARD.

[1871 L. 177.]

Settlement—After-acquired Property—Covenant to Settle—Exception of Property settled on Wife for her Separate Use—Contingent Reversionary Interests not falling into Possession during Coverture.

A settlement made in 1870, on the marriage of L. (the husband) and D. (the wife), contained a covenant by both of them with the trustees of the settlement that all other, if any, the present and future real and personal estate and effects whatsoever, whether in possession or expectancy, of or to which L. and D., or either of them in her right, or by marital right, should at any time or times during the coverture become seised, possessed, or entitled, or of or to which L., or any person claiming through or under him, should by any means whatsoever become, in her right or by marital right, at any time or times after solemnization of the marriage, seised, possessed, or entitled, except only such estate and effects as should be settled on her for her separate use, should from time to time, as soon as might be thereafter, or after they or he should become possessed of or entitled to the same, be conveyed, assigned, transferred or paid unto the trustees, and be settled and assured upon the trusts of the settlement, or such of them as should be subsisting and capable of taking effect.

D. in 1871 (during the coverture) became entitled under her mother's will to a contingent reversionary interest in part of the proceeds of sale of realty and personalty which was given for her separate use, and under a codicil to the same will to a contingent reversionary interest in another part of the proceeds, which was not given for her separate use,

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After L.'s death the interest under the will fell into possession; the interest under the codicil was still reversionary:—

Held, following *Kane* v. *Kane* (1880), 16 Ch. D. 207, that the interest under the will was not within the operation of the covenant.

Held also, that the interest under the codicil was within the covenant.

Townshend v. *Harrowby* (1858), 4 Jur. (N.S.) 353, and *In re Michell's Trusts* (1878), 9 Ch. D. 5, considered.

Semble, that it always has been possible, whether before or after Malins' Act, by a properly framed covenant as to after-acquired property in a marriage settlement, to bind a married woman's reversionary interests, whether contingent or otherwise, acquired during coverture, but not falling into possession until afterwards; and that the Court can and always could, notwithstanding technical difficulties as to getting an actual conveyance, bind the property in the hands of every one, including the heir or legal personal representative of the husband or wife, as the case may be.

By an indenture dated August 17, 1870, and made between Diana Goring, spinster, of the first part, Captain William Digby Lloyd of the second part, and three others (trustees) of the third part, being a settlement executed prior to and in contemplation of the marriage of the parties of the first and second parts, certain real and personal property belonging to the intended wife were settled so as to be held by the trustees upon trust to pay the income thereof to the wife for life for her separate use, without power of anticipation, and, after her death, to pay the income to the husband during his life, and, after the death of the survivor, to hold the trust estate upon trust for the children or remoter issue of the wife, whether of the then intended or any future marriage, as she should appoint. The settlement also provided that unless the contrary should be directed by any appointment made by the wife, it should be lawful for the trustees, with the consent in writing of the husband and wife, or the survivor of them, during their, his and her lives and life, to advance and apply for the advancement or benefit of a child or children or other issue of the wife any sum or sums of money not exceeding in the whole one half or the value of one half of the then vested or expectant share of the same child or other issue of and in the trust estate.

The settlement also contained the following covenant:—

"And each of the said William Digby Lloyd and Diana Goring doth hereby for himself and herself, his and her heirs, executors,

administrators and assigns, covenant with the" trustees, "their heirs, executors and administrators or assigns that all other, if any, the present and future real and personal estate and effects whatsoever, whether in possession or in expectancy, of or to which the said William Digby Lloyd and Diana Goring, or either of them in her right or by marital right (and including such part or the whole of the freehold, copyhold and leasehold estates" comprised in a certain settlement, "to which the said Diana Goring may at any time hereafter during her coverture become entitled absolutely, and as to the freehold and copyhold estates for estates in fee simple) shall at any time or times during their intended coverture become seised, possessed, or entitled, and of or to which the said William Digby Lloyd, or any person claiming through or under him, shall by any means whatsoever become in her right or by marital right at any time or times after the solemnization of the said intended marriage seised, possessed or entitled, except only such estate and effects as shall be settled on her for her separate use, and any money and other personalty of or to which they, he or she may become possessed or entitled as aforesaid at any one time not exceeding in amount or value 50*l.* and not being part of any estate or effects of an amount or value exceeding in the whole 50*l.*, shall from time to time, as soon as may be hereafter, or after they, he or she shall become possessed of or entitled to the same, and at the expense of the trust estate, be conveyed, assigned, transferred or paid unto the" trustees, "and be settled and assured upon the trusts and subject to the powers and provisions of this settlement concerning the trust estate, or such of the same trusts, powers and provisions as for the time being shall be subsisting and capable of taking effect, and in the meantime shall be subject in equity to the same trusts, powers and provisions, and be dealt with and enjoyed accordingly."

The settlement was executed by all the parties to it, and the marriage took place on August 18, 1870. Mary Elizabeth, Lady Goring, the mother of Mrs. Diana Lloyd, died on October 20, 1871, having by her will (dated July 4, 1867) given all her real and personal estates (except certain specified property) to trustees upon trust to sell the same; and, after payment of certain

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pecuniary legacies, she declared that the trustees of her will should stand possessed of all the residue of her estates and property, and the proceeds thereof and the investments thereof, upon trust to receive the income thereof and to pay thereout unto her daughter Emily Mary Goring an annuity of 400*l.* for her life. The will continued as follows: "And as to the residue of the said . . . . income during the natural life of the said Emily Mary Goring upon trust to pay and divide the same unto my said daughters Margaret Goring and Diana Goring in equal shares as tenants in common, and their respective executors, administrators and assigns, and as to all the said rest residue and remainder of my estates and property and the proceeds thereof" and investments thereof "upon trust from and immediately after the decease of my said daughter Emily Mary Goring for the sole and separate use of such one or more of my said daughters Margaret and Diana as shall be alive at the time of the decease of the said Emily Mary Goring or who being dead shall have left issue then living, and if more than one in equal shares as tenants in common, and their respective executors, administrators and assigns."

By a codicil Lady Mary Elizabeth Goring directed that the share in the corpus of her residuary estates to which her daughter Margaret would or might become entitled under the will on the decease of Emily Mary Goring, should be held by the trustees of the will upon trust to invest the same and during the life of Margaret to pay the income to her, and that after her death the same share of corpus should be held in trust for such of her children as should attain twenty-one, and that if there should be no such child, then, subject to Margaret's life interest, the same share of corpus should go to Diana Goring, her "executors, administrators and assigns for her and their own absolute use and benefit."

In December, 1871, Diana Lloyd commenced a suit for the execution of the trusts of the will and codicil, and administration of the real and personal estate of Lady Mary Elizabeth Goring, and in the same month the usual decree for administration was made.

In October, 1873, Margaret Goring married Albert Edward Fisher.

William Digby Lloyd died on May 21, 1883, and the issue of his marriage with Diana consisted of two children only.

Diana, in November, 1887, married Anthony J. W. Biddulph, and by a settlement made on the occasion of this marriage, after reciting that doubts were entertained whether her reversionary contingent interests in the funds in Court in the suit (being the investments of the proceeds of the estate of Lady Mary Elizabeth Goring) under the will were subject to the covenant to settle after-acquired property in the settlement of 1870, Diana assigned to the trustees of the settlement of 1887 all the contingent or other interests to which she was entitled under the will, on certain trusts under which (subject as therein mentioned) she had a general power of appointment in default of issue of the second marriage.

Anthony J. W. Biddulph died in August, 1895, and there was no issue of his marriage with Diana.

Emily Mary Goring died in August, 1903.

Albert Edward Fisher died in October, 1904, and there was never any issue of his marriage with Margaret, who was still alive.

Mrs. Biddulph, and the trustees of the settlement of 1887, presented a petition in the action (which had been from time to time revived) asking for a declaration as to whether the interests of Mrs. Biddulph under the will and codicil respectively were subject to the covenant to settle after-acquired property.

The petition was heard on November 9 and 12, 1907.

Buckmaster, K.C., and *A. L. Ellis*, for the petitioners. The after-acquired property clause in Diana's marriage settlement of August 17, 1870, did not affect any of the property to which she became entitled under the will and codicil of Lady Goring. Therefore it was in her power to assign it, and she has assigned it to the trustees of her settlement of November 19, 1887. The question depends upon the words of the will and codicil and of the settlement of 1870. On the death of Emily in 1903 Diana became absolutely entitled to one half of the residuary property of the testatrix. By the will that was given to her for "her sole and separate use"; therefore it was "settled on her for her

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separate use" within the words of the exception to the after-acquired property clause, and was not caught by the clause: *Kane* v. *Kane*. (1)

The reversionary interests to which she becomes entitled on the death of Margaret are not within the clause. They do not come under the words "in possession or in expectancy." Those words mean whether in possession or reversion, and refer to vested interests; expectancy does not include contingent reversionary interests. It was not within the intention of the parties in 1870 that, in the events which have happened, these interests should be settled: *In re Michell's Trusts*. (2) They did not exist in 1870 when the settlement was executed; they came into being in 1871, and did not fall into possession during the coverture. Even if the words "in expectancy" cover contingent reversionary interests this property is not caught by the clause, for it did not fall into possession till long after the coverture had ceased, and the wife could not then be compelled to assign it. The covenant was only intended to apply to property which the husband might take in right of his wife, and it cannot apply after his death: *In re Michell's Trusts* (2); *Townshend* v. *Harrowby* (3); Norton on Deeds, pp. 599, 601. Diana's covenant was only operative during the coverture, and after her husband's death she could not be compelled to give effect to it: *In re Currey*. (4)

Romer, K.C., and the *Hon. Frank Russell*, for the trustees of the settlement of 1870. All the property which came from Lady Goring is caught by the covenant. On the first point we submit that property left to a married woman for her separate use is not "settled" in the ordinary sense of the term, nor within the exception to this covenant. In *Kane* v. *Kane* (1) the words were "otherwise settled."

Secondly, the contingent reversionary interests are within the word "expectancy." That expression is most appropriate to contingent interests. But the settlement itself explains the meaning of the word, for in the advancement clause "expectant" is opposed to "vested." It is said that on the true construction of the covenant these interests must be excepted, for otherwise the

(1) 16 Ch. D. 207.
(2) 9 Ch. D. 5.
(3) 4 Jur. (N.S.) 353.
(4) (1886) 32 Ch. D. 361.

husband and wife would be covenanting to do something which they could not be compelled to do. But in the cases referred to by the petitioners the point was that the property could not be assigned, and that it was not to be supposed that the parties had covenanted to perform an impossibility. In the present case, Diana could have assigned these interests if she had wished to do so. If they had fallen in during the coverture, or if the husband had survived the wife, the covenant could have been enforced against him. Diana was competent as a spinster to enter into a covenant to settle this property, and even if it might not have been possible to compel her to assign it during coverture, the covenant could be enforced when the coverture came to an end. There are many cases in which reversionary interests have been held to be bound by such covenants as this. The fact that they are contingent makes no difference: *In re Ware.* (1) The covenant of the husband and wife applies to a reversionary interest which does not fall into possession until after the coverture has ended: *Dickinson* v. *Dillwyn* (2); *Butcher* v. *Butcher* (3); Davidson's Conveyancing, 3rd ed. vol. iii. pp. 199, 212. If the husband alone covenants to settle property of the wife coming to her during the coverture, and she assents by being a party to the settlement, the property is bound: *In re Haden.* (4)

[They also referred to *Young* v. *Smith* (5); *In re Jackson's Will.* (6)

Parker J. referred to *In re Bankes* (7); *Hughes* v. *Young* (8); *Lee* v. *Lee.* (9)]

Coote, for the representatives of Lady Goring's surviving executor.

Buckmaster, K.C., in reply.

Parker J. The point which I have to decide in this case is whether certain property to which the petitioner, Diana Biddulph, who was formerly Diana Lloyd, became entitled during her marriage with the late Captain Lloyd is bound by a certain covenant

(1) (1890) 45 Ch. D. 269.
(2) (1869) L. R. 8 Eq. 546.
(3) (1851) 14 Beav. 222.
(4) [1898] 2 Ch. 220.
(5) (1865) L. R. 1 Eq. 180.
(6) (1879) 13 Ch. D. 189.
(7) [1902] 2 Ch. 333.
(8) (1862) 32 L. J. (Ch.) 137.
(9) (1876) 4 Ch. D. 175.

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contained in a settlement which was made upon the occasion of that marriage. The property in question consists of two interests which the lady took under the will and codicil of her mother, the late Lady Mary Elizabeth Goring, and I must deal with those interests separately. The first interest with which I will deal is that which is given by the will. [His Lordship read the portions of the will containing the gifts during the life of Emily Mary Goring, in trust for her daughters Margaret and Diana, and the gifts of corpus to them after the death of Emily Mary Goring, and continued:—] So that under that gift Diana Biddulph became entitled, subject to certain intermediate interests conferred upon the three sisters, to an interest after the death of Emily Mary Goring in the residuary estate. In the events that have happened she took one half; but during the life of Emily Mary Goring that interest was a contingent interest, the gift being to her only in the event of her surviving or having left issue surviving Emily Mary Goring. She therefore became entitled to a contingent reversionary interest during the coverture, though the contingency did not happen during the coverture, nor did she become entitled in possession during the coverture. It is to be observed that whatever interest she took under the gift is an interest given to her for her sole and separate use.

Now, if one turns to the covenant contained in the marriage settlement of 1870, it is a covenant by the husband and wife for the settlement of the after-acquired property of the wife; but from that covenant there is excepted such estate and interest as shall be settled on her for her separate use. On the decision in *Kane* v. *Kane* (1), which was cited to me in the course of the argument, I think that I am bound to hold that this contingent reversionary interest which Diana Biddulph took under her mother's will during the coverture, being given expressly for her separate use, was settled to her separate use within the meaning of the covenant, and therefore as to that property it appears to me that it is not bound in any way by the covenant contained in the settlement.

The second interest, which Diana Biddulph took under the codicil to her mother's will, was an interest in her sister

(1) 16 Ch. D. 207.

Margaret's share of the residuary estate given by the will. The codicil altered the effect of the will, and gave Margaret's share under the will to her for life, with various trusts in favour of her issue, or, if she dies ultimately without issue, the property goes to Diana Biddulph under the express terms of the codicil. So that that interest was contingent in another way. It was contingent not only on Margaret's surviving the tenant for life or quasi tenant for life, but also on Margaret's dying without issue, which may happen at any time, and which has not happened yet, so that it is still contingent. The interest which is given by the codicil is given to the absolute use of Diana Biddulph, and is not, as in the case of the interest given by the will, given to her for her separate use, and therefore does not fall within the exception to which I have referred. Different considerations therefore arise, and it becomes necessary to look at the precise terms of the covenant to see whether a contingent reversionary interest of that sort is or is not intended to be bound.

Now I cannot doubt that, as a matter of law, any lady, when she marries, can, by a covenant on the part of herself and her husband properly framed, bind reversionary interests or contingent reversionary interests which she acquires during coverture, notwithstanding that the reversion does not fall in or the contingency happen during the coverture. But there have been many instances in the cases of covenants as to which a doubt arose whether reversionary interests or contingent reversionary interests of that sort were, or were not, bound by the covenant. In construing covenants to settle after-acquired property, it appears to me the first thing one has to do is to consider who are the covenanting parties. In many cases the husband only is the covenanting party; and if the husband only is the covenanting party there is a strong prima facie reason for saying that the sole object of the covenant is to exclude the right which the husband takes in his wife's property, and not to bind her interest in favour of the persons entitled under the settlement. On the other hand, where the wife and husband both join in the covenant, it appears to me there is a strong prima facie reason for saying that the object of the parties was not only to exclude

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what I may call the husband's marital right, but to make a provision out of the wife's property for her issue or the other persons entitled under the trusts of the settlement in question.

Another consideration in construing these covenants is no doubt sometimes the question who is to join in and take part in the settlement, because, even if the wife is a party to the covenant, yet if the covenant is only that the husband shall do something, and not that the wife shall concur in doing it, you may have an inference arising similar to that which arises where the husband alone is the covenantor.

Now, in the present case it is quite clear that both husband and wife joined in the covenant, so that there is no difficulty with regard to the question as to who is bound by the covenant and who is the covenanting party. Also it is quite clear that the settlement is to be made by all necessary parties, because it is not defined who is to join in the settlement, but the covenant is that the property is to be conveyed, assigned, transferred, or paid unto the trustees, without saying who is to join in the conveyance, assignment, transfer, or payment. Therefore I do not think that any inference can be drawn from the form of the covenant, so far as that is concerned, as to what property is or is not comprised in it. Prima facie everything which is acquired by the wife during coverture is to be comprised in it, and prima facie all necessary parties are to join in the settlement which is made in accordance with it.

Now I will examine in greater detail the terms of the covenant. It is a covenant by the husband and the wife, "That all other, if any, the present"—I may leave that out of account, because this was clearly future property—"and future real and personal estate and effects." [His Lordship read the words of the covenant down to the words "as shall be settled on her for her separate use," and continued:—] That covenant naturally divides itself into two parts. The first part is a covenant to settle property the title to which accrues during the coverture; the second part extends to property the title to which accrues at any time, but in the case of the latter class of property, the title to which accrues at any time, the wife's interest is not bound by the

covenant, but the husband's interest is. It appears to me, therefore, that the words of this covenant are in the widest possible form, and that it is very difficult to put any limitation as to the nature of the estate which was intended to be included in it. Stress has been laid upon the first part of the covenant, referring to "the future real and personal estate and effects whatsoever whether in possession or in expectancy," with the object of shewing that not every reversionary interest was intended to be included, but that "expectancy" there refers to a vested as opposed to a contingent reversion. I cannot read the words as bearing that meaning or creating that limitation on the property comprised in the settlement to be made in accordance with the covenant. It appears to me that the words "future real and personal estate and effects whatsoever" are not in any way cut down by the words "whether in possession or in expectancy." In other words, the phrase "whether in possession or in expectancy" merely means whether the property is of such a character that it can be enjoyed at once in possession, or whether some interval has to take place before it comes into possession and becomes capable of actual enjoyment. I do not think that the draftsman here in the least intended to draw any such distinction between vested and contingent reversionary interests as the petitioners' counsel have suggested. It appears to me, therefore, that reversionary interests, whether contingent or otherwise, are within the express words of the first part of that covenant. Mrs. Biddulph did become entitled to a contingent reversionary interest in certain property, and it appears to me that that contingent reversionary interest is prima facie bound by a covenant containing words as large as this covenant does.

Next it was suggested that I must limit the effect of this covenant so as to exclude all reversionary interests of the wife acquired during the coverture which did not fall into possession until afterwards, because of the form of the covenant itself, and in particular that part of it which relates to property which the husband, or any one in his right, might become entitled to at any time, whether during or after the coverture, either in right of his wife or by marital right. It appears to me that those words extending the covenant to property, the title to which

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may accrue to the husband after the coverture in right of his wife, or by marital right, really relate to property which the husband may possibly take under such circumstances as these. It might be that the wife's father, say, left her a share in his estate, and though the wife's father might have survived the wife, that legacy might have been good under the Wills Act, and might go to the husband as the person entitled to take out representation to his wife. I think probably that would be included in a covenant containing such large words as the covenant in question. The covenant might also extend to property which the wife had for her separate use, and as to which she died intestate, so that the husband would become entitled upon obtaining administration to his wife's estate. It seems to me that there is property to which these words can apply, without holding them applicable to the husband's interest in a reversion of his wife's acquired during coverture, but not falling into possession until after the coverture ended. I do not therefore think the proper inference is that because of those words I ought to limit the operation of the former part of the covenant which deals with property acquired during the coverture.

Lastly, it is said that, on the true construction of this covenant, it is a covenant which is only intended to comprise what the husband might take in right of his wife so as to prevent him from asserting any right to her property during the coverture, and that, inasmuch as the reversionary interest in question did not fall into possession during the coverture, it is not bound. In support of that view various cases have been cited, and, in particular, *In re Michell's Trusts* (1) and *Townshend* v. *Harrowby*. (2) At one time in the course of the argument I thought the case was put as high as this—that in construing these covenants you must consider first whether it is possible, for the people who covenant that they will join in making the settlement, to make any settlement, and that in the case of a reversionary interest of the wife before Malins' Act, inasmuch as no settlement was possible, no covenant to settle that property was possible either. Further, I think it was suggested in the course of the argument that inasmuch as there is a difficulty in

(1) 9 Ch. D. 5. (2) 4 Jur. (N.S.) 353.

enforcing the specific performance of a contract by a married woman, which has not been acknowledged by her, in relation to her real estate, therefore a covenant dealing with the after-acquired real property of the wife could not be enforced during the coverture, and, therefore that some inference arose that it was not intended to be bound by the covenant. I do not take that view. It appears to me that it always has been possible, whether before or after Malins' Act, to frame a covenant in such a way that the reversionary interest of a married woman acquired during coverture, but not falling into possession until afterwards, is bound, and that the arm of the Court is, and always has been, long enough, even if there be technical difficulties in the way of getting an actual conveyance, to bind the property in the hands of every one, including the heir-at-law or the legal personal representative of the husband or wife, as the case may be. And I am of the same opinion with regard to covenants to settle the after-acquired realty of the wife. With regard to the two cases to which I have just referred, there are no doubt dicta in them which point to the fact that you may legitimately consider, on the question of what property is comprised in the covenant, who is the party to make the settlement, and what would be the effect of the settlement, if made; but I do not understand either of those cases really decided any such principle as was contended for, and both turned upon the circumstances of the particular case. In *In re Michell's Trusts* (1) the covenant was a covenant by the husband only, and not by the wife, and that alone, I think, having regard to the other cases, might have been sufficient to prevent the covenant operating in the events which had actually happened. But, further than that, it was a covenant to settle any property which might come to or devolve upon the wife, and at the time of the marriage the wife was entitled to a contingent reversionary interest. The contingency happened, and the interest became vested during the coverture, but the reversion did not fall in till after the coverture, and it was held that the property vesting in interest after the marriage, but not in possession during the coverture, was not bound. In *Townshend* v. *Harrowby* (2) the property was given to such

(1) 9 Ch. D. 5. (2) 4 Jur. (N.S.) 353.

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uses as the married woman should appoint, and in default of appointment, for her separate use for her life, with limitations over to her absolutely, and Kindersley V.-C. came to the conclusion that he must treat each of those interests as separate interests in considering whether the property was bound by the covenant contained in the settlement. It was clear, of course, that the power was not property at all, and could not be bound. It was equally clear that a life interest settled to her separate use was not bound, because the presumption is that covenants of this sort do not apply to life interests; and then came the third question, whether this reversion was bound, and Kindersley V.-C. held that in the events that had happened, namely, the husband having survived, the property was bound, leaving open the question, as far as I understand it, whether the property would have been bound if the husband had pre-deceased the wife. There are again certain expressions as to the possibility of the wife and husband joining together in making the settlement in question, but I do not think that that case amounts to a decision that in the case of the wife surviving the husband the wife would not have been bound.

On the other hand, it appears to me that in the various cases which have been cited the assumption has always been that the wife's reversionary interests accruing so far as title is concerned during the coverture, but not falling into possession till afterwards, can be bound by her covenant to settle after-acquired property. For instance, in the case of *In re Haden*(1), there was a covenant by the husband that the after-acquired property of the wife should be settled. It was held in that case that, having regard to the form of the settlement, the wife was bound by the covenant, and Stirling J. went on to hold, as I understand the case, that the wife's interest in the real estate, the title to which came to her during the coverture, was bound though she survived her husband, and that her heir-at-law could not set up a title in contravention to the express terms of the covenant; and Stirling J. cites *Lee* v. *Lee* (2), in which case, again, it appears to me to have been held that a reversionary interest of the wife, the title to which accrued during the

(1) [1898] 2 Ch. 220. (2) 4 Ch. D. 175.

coverture, was bound, although the wife survived the husband. There are other cases, which were cited by Mr. Romer, which appear to me to make the same tacit assumption.

On the whole, therefore, I come to the conclusion that there is nothing to prevent me from giving effect to what I consider to be the true intent and meaning of this covenant, and holding that it does include contingent reversionary interests of the wife, the title to which accrued during the coverture, but which did not fall into possession till the coverture was over. In the result, therefore, my decision as to the first interest taken under the will of Lady Goring is that it is not comprised in or affected by the covenant to settle after-acquired property. With regard to the second interest, which is still reversionary, and which Diana Biddulph takes after the death of Margaret, contingently on Margaret not leaving issue, and which was not given for her separate use, that is bound by the covenant.

Solicitors: *Rawle, Johnstone & Co.; H. E. Griffith.*

F. E.

BRISTOL UNITED BREWERIES, LIMITED *v.* ABBOT.

[1907 B. 4261.]

Company—Mortgage—Registration—"Charge created by the Company"—Debenture Stock—Covering Deed—Sale of Part of mortgaged Property—Substitution of other Property—Companies Act, 1900 (63 & 64 *Vict. c.* 48), *s.* 14.

Where property is conveyed by a company to trustees to secure debentures or debenture stock, and the trust deed empowers the trustees to sell any part of the property conveyed before the security is enforceable, and with the proceeds to purchase other property which is to be held upon the like trusts, and the trustees sell part of the property, and with the proceeds of sale purchase other property which is conveyed by the vendor to them upon the trusts of the trust deed, the company not being a party to the conveyance, the conveyance is not a mortgage or charge requiring registration under s. 14 of the Companies Act, 1900.

Cornbrook Brewery Co. v. *Land Debenture Corporation*, [1904] 1 Ch. 103, distinguished.

The Bristol United Breweries, Limited, which was incorporated in 1899 by a trust deed dated June 3, 1896, covenanted to

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convey to the then trustees of the deed certain landed properties to secure debenture stock created by the company. The deed provided that the expression "'the specifically mortgaged premises' should mean the freehold and leasehold hereditaments hereinafter covenanted to be assured, and all other assets made a specific security for the stock under" clause 18 and other clauses of the deed, "or otherwise." Clause 18 enabled the trustees at any time before the security became enforceable, upon the application and at the expense of the company, to sell all or any of the specifically mortgaged premises in the same manner as they could if the primary trust for conversion had arisen, and with moneys forming part of the specifically mortgaged premises to acquire other freehold, leasehold, or copyhold property; and provided that all net capital moneys arising from any dealings under the clause and all assets acquired pursuant to the clause should become part of the specifically mortgaged premises, and should be vested in the trustees. Certain properties were conveyed to the trustees in pursuance of the covenant.

In exercise of the power contained in clause 18, the trustees, on the application and at the expense of the company, sold certain parts of the specifically mortgaged premises, and part of the purchase-money was invested by the trustees in the purchase of freehold houses belonging to one Edbrooke, who by a conveyance dated November 11, 1907, and made between Edbrooke of the one part and the trustees of the trust deed of the other part, conveyed the houses to the trustees in fee "upon the trusts and for the purposes of the hereinbefore recited indenture dated June 3, 1896, and as part of the specifically mortgaged premises the trusts whereof were thereby declared."

An action was brought by the company against the trustees to obtain a decision of the question whether the conveyance ought to be registered pursuant to s. 14 of the Companies Act, 1900, as a "mortgage or charge created by the company."

The plaintiff company moved for an interlocutory injunction to restrain the trustees from registering the deed of November, 1907, under s. 14 of the Companies Act, 1900.

Buckmaster, *K.C.*, and *Martelli*, for the company. The conveyance does not require registration under s. 14 of the Companies Act, 1900, for it is not "a mortgage or charge" within that section, and, moreover, is not "created by" the company, for the company was not even a party to the conveyance. Where leaseholds subject to a debenture trust deed were sold and the proceeds of sale were allowed to be applied in purchasing other leaseholds, which were assigned to the company, which then sub-demised the purchased property to the trustees upon the trusts of the deed, it was held that the sub-demise required registration under s. 14: *Cornbrook Brewery Co.* v. *Law Debenture Corporation*. (1) But in that case Vaughan Williams L.J. expressed an opinion that if there had been a direct purchase by the trustees the result "might have been different."

Elgood, for the trustees. The parties to this action are not hostile to each other. The question really is whether the property conveyed became, by virtue of the conveyance, mortgaged property. The trustees have no wish to register the deed if registration is unnecessary.

PARKER J. In my judgment the conveyance of November 11, 1907, is not "a mortgage or charge created by a company" within the meaning of s. 14 of the Companies Act, 1900. The conveyance does not create any mortgage or charge at all. The defendants are the trustees of a trust deed to secure debenture stock of the company, and as such received money forming the proceeds of sales, made in exercise of a power of sale, of parts of the specifically mortgaged premises; and under the power of investment contained in the trust deed they purchased, with part of the money, the houses comprised in the conveyance. In my judgment that is simply a sale and reinvestment under the powers of the trust deed, and not a mortgage or charge. I am confirmed in this view by the fact that the company was not a party to the conveyance, the vendor and the trustees being the only parties to it. Everything which was done was done under the powers of the trust deed.

As the parties have agreed to treat this motion as the trial of

(1) [1904] 1 Ch. 103.

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the action, I will make a declaration that the conveyance is not a mortgage or charge requiring registration under s. 14 of the Companies Act, 1900.

Solicitors for plaintiff company: *Robbins, Billing & Co.*

Solicitors for defendants: *Robbins, Billing & Co., for Pope, Brown & Abbot, Bristol.*

F. E.

PARKER J. 1907 *Nov.* 21.

In re HARRISSON.

Costs — Taxation — Solicitor and Client Costs — Counsel employed against Client's Instructions—Rules as to employing Counsel, 1892, *r.* 20.

A solicitor cannot rely upon the Rules, as to employing counsel, of 1892, so as to justify himself, as between himself and the client, in employing particular counsel contrary to the express instructions of the client; and if counsel is employed in defiance of the client's instructions, although under r. 20 he may as a matter of etiquette be entitled to a brief at the trial by reason of his having advised during the progress of an action on behalf of the client, his fees and the costs incidental to his employment will be disallowed on taxation.

PRIOR to the commencement of proceedings in the Probate Division of the High Court a certain King's Counsel (hereinafter called "Mr. A.," although that is not the initial of his surname) had been consulted by a firm of solicitors on behalf of certain ladies interested in the matter, and had advised unfavourably as to their case, and after the proceedings had been commenced the same King's Counsel gave an opinion on a question whether a lady, who was not a party to the action, but was financing the proceedings on behalf of her daughter, should be appointed guardian ad litem of an infant defendant, and again the opinion was unfavourable. The ladies were adverse to the King's Counsel who had so advised representing them as one of their counsel at the trial, and they objected to his being so employed.

On October 14, 1905, Mrs. Johnston, one of the clients in question, wrote to the solicitors who had consulted Mr. A. a letter containing these words: "A man who has given such an adverse opinion is not entitled to be briefed for the case, for then, I agree with him, we should have very little chance of winning,

and naturally we should not like to have our interests in his hands. We have not authorized you to brief Mr. A. or —— for our case, when it comes on; because you chose Mr. A.'s opinion on our case it does not in any way bind us to brief him at the trial." Then the letter insisted that another counsel who was named should be briefed.

The answer of the solicitors, written on October 15, deprecated the briefing of the counsel whom the client desired to brief on the ground of expense and otherwise, and then proceeded as follows: "Besides all this, there is a rule of the profession (binding upon both counsel and solicitors) which practically prevents us from briefing any one but the counsel already employed in the case, whom we advisedly selected originally as being the best for the purpose."

Afterwards an interview took place between the clients and the solicitors, and, notwithstanding what the solicitors told them, the clients insisted upon briefing the counsel named by them instead of the one who was originally employed; and the reasons which were given by one of the firm of solicitors at that interview with regard to the necessity of employing the counsel originally employed were the same (perhaps stated in greater detail) as those which the solicitors had mentioned in their letter. In effect this gentleman told his clients that he was bound to employ the counsel in question because of the rule governing the etiquette of the profession; and the position taken up by the clients was that they insisted upon having the counsel named by them, and objected to the employment of the counsel originally consulted. The solicitors nevertheless employed and paid Mr. A. as one of the counsel at the trial, and charged the payments made and incidental costs in their bill.

On taxation of the bill of costs the clients objected to all items in connection with the employment of Mr. A. as one of their counsel, but the taxing officer allowed the items, and in answer to the objections against his allowance of the fees paid and the incidental costs gave the following answer: "Having regard to resolution 20 as to Bar etiquette, as Mr. A. had advised during the proceedings and did not waive the delivery of a brief at the hearing, in my opinion the solicitors were bound to deliver the

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brief, and are therefore entitled to recover fees paid from their client."

Resolution 20 is one of several resolutions which are stated in the Annual Practice (1908), vol. ii. p. 743, to have been prepared by the Bar Committee; approved by the Attorney-General and by the Council of the Incorporated Law Society, 1892." The resolution, so far as material, is as follows: "Counsel who has . . . . advised . . . . during the progress of an action on behalf of any party . . . . is entitled to a brief at the trial . . . . unless express notice to the contrary shall have been given to him with the instructions to . . . . advise."

The clients applied for a review of the taxation.

Martelli, for the clients. Rule 20 of the Etiquette Rules is not applicable to the present case. If it is, it does not bind the lay client. Moreover, the solicitors did nothing reasonably calculated to induce Mr. A. to waive any right he had to a brief at the trial. His clerk only was consulted on the matter. The action was settled without the case being opened, and Mr. A. was not in Court. In *Kennedy* v. *Broun* (1) Erle C.J. says: "We consider that a promise by a client to pay money to a counsel for his advocacy, whether made before, or during, or after the litigation, has no binding effect; and, furthermore, that the relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation." The principle is that the advocate cannot contract with his client; and the solicitor was under no obligation to brief A., but was wrong in doing so in defiance of absolute instructions to the contrary. The so-called Rules of Etiquette do not bind the lay client; they were only made for the protection of counsel. [He also referred to *In re Broad and Broad.* (2)]

Austen-Cartmell, for the solicitors. In a proper case for employing counsel, where only the usual fee is paid, the client is bound.

[PARKER J. Where the employment is in pursuance of the solicitor's ordinary authority.]

Having regard to the rules of etiquette, which were pointed

(1) (1863) 13 C. B. (N.S.) 677, 727. (2) (1885) 15 Q. B. D. 420.

out to the clients, the solicitors were justified in employing Mr. A. In any case, the general authority of the solicitors as to employing counsel continued until expressly revoked by the clients.

Martelli in reply.

PARKER J. This is a summons to review the taxing Master's certificate on certain points arising on a solicitor and client taxation. In that taxation the taxing Master has allowed the costs of briefing a counsel, and those costs have been objected to on the ground that the brief was delivered by the solicitors to the counsel in question in direct opposition to the wishes and instructions of the clients, and that the counsel was not specially retained on behalf of the clients, "nor was he in the circumstances entitled to claim a brief under r. 20 of the resolutions as to professional etiquette, and there was no professional etiquette under this rule or otherwise applicable to the circumstances requiring the solicitors to deliver such brief to Mr. A. Even if any rule of etiquette requiring the delivery by the solicitors of a brief to Mr. A. in this case existed, such rule could not be binding upon or enforced against the expressed instructions and wishes of the clients. In any case the solicitors did not take the proper course or do their best, as was their duty, to carry out the instructions in this respect of the petitioners," their clients. [His Lordship read the answer of the taxing Master, and continued:—] In my judgment that answer is no good answer, because it assumes that these rules of etiquette as between members of the profession have an effect outside and beyond the relations inter se of members of the profession in both its branches. I do not think that they have any such effect, or indeed affect in any way the relations known to the law between solicitor and client. If they are enforceable at all, they are only enforceable because the members of the profession choose to govern their conduct by reference to them. If, for example, a client of a solicitor positively instructs him not to brief a certain counsel, I do not think that he is bound to brief that counsel as between himself and his client, so as to saddle his client with liability for so briefing the counsel, merely

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because under the Rules of Etiquette which have been sanctioned by both branches of the profession the counsel is said to be entitled to a brief.

In my judgment the proper course for a solicitor to pursue when he is instructed not to brief a certain counsel, who, according to these Rules of Etiquette, is said to be entitled to a brief, is either to explain the rules to the client and say that when he briefs anybody else he will have, in fairness to him and to the profession generally, to state the facts, in which case the brief may probably be returned; or, if he feels that the case justifies it, he may say that he is so clearly governed by the rules of the profession and the etiquette of the profession that, if he is not allowed to brief that counsel, he shall feel justified in throwing up his retainer and refusing to act for the client any further. But it does not seem to me that he can rely upon the Rules of Etiquette which have been so adopted by both branches of the profession so as to justify him in briefing the counsel in question, notwithstanding his client's refusal to give his authority, and then charge his client with the expenses incurred in delivering the brief. It appears to me that the taxing Master is wrong, because he has assumed that, because according to the Rules of Etiquette the counsel may be entitled to a brief, therefore the client is bound to pay the costs of that brief, notwithstanding that the client has given express instructions that the counsel in question shall not be briefed. If that is the case, and if the facts, as stated in the objection, are correct —namely, that they were incurred in direct opposition to the express instructions to the contrary of the clients—then all these fees ought to be disallowed.

It appears that the counsel in question, prior to the issue of the writ in the Probate Division, had advised on the case, and had advised, if not adversely, at any rate with considerable hesitation as to whether the case of his clients was really a good one. After the issue of the writ a question arose as to whether a lady who was not a party to the action, but who was financing the proceedings on behalf of her daughter, should be appointed, or could properly be appointed, as guardian ad litem of an infant defendant who was never

represented by the solicitors in the present case. On that point the counsel in question was consulted after the issue of the writ; and that is the only thing which it is suggested brings him within r. 20, if within the meaning of that rule the writ is the commencement of the proceedings on which he has been consulted. The clients were—not unnaturally, perhaps, though from another point of view quite unreasonably—adverse to employing a counsel who had advised so much against them on the merits of the case, thinking that, with a counsel who had so advised, they might have less chance of succeeding than with a counsel who had not advised them in the case at all, or whose opinion was more favourable to their case; and on that ground, and on that ground alone, they desired that the counsel in question should not be briefed at the trial. They desired that in his stead another very eminent counsel should be briefed, and they pressed that point, too, upon their solicitors. On October 14, 1905, Mrs. Johnston, one of the clients in question, writes to the solicitors a letter containing these words: "A man who has given such an adverse opinion is not entitled to be briefed for the case, for then, I agree with him, we should have very little chance of winning, and naturally we should not like to have our interests in his hands. We have not authorized you to brief Mr. A. or —— for our case, when it comes on; because you chose Mr. A.'s opinion on our case it does not in any way bind us to brief him at the trial." Then the letter goes on to insist that another counsel should be briefed. It seems to me that prima facie that is a direct instruction on the part of the clients to the solicitors not to brief a particular counsel. The answer to that, which is written on October 15, deprecates the briefing of the eminent counsel whom the clients desired to brief, on the ground of expense and otherwise, and then proceeds to state: "Besides all this, there is a rule of the profession (binding upon both counsel and solicitors) which practically prevents us from briefing any one but the counsel already employed in the case, whom we advisedly selected originally as being the best for the purpose." That is, of course, a reference to r. 20 of the Rules of Etiquette to which I have already referred. After that an interview took place between the clients and the solicitors, and, notwithstanding

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what the solicitors told them, the clients insisted upon briefing the eminent counsel in question instead of the one who was originally employed; and I find on the evidence that the reasons which were given by one of the firm of solicitors at that interview with regard to the necessity of employing the counsel originally employed were the same, although perhaps stated in greater detail, which the solicitors had mentioned in their letter. In effect this gentleman told his clients that he was bound to employ the counsel in question because of this rule governing the etiquette of the profession; and, in my judgment, the evidence points to the fact that the position upon that taken up by the clients was this: "Well, we insist upon having the counsel we name, and, of course, if you are bound to employ the other counsel, we suppose we cannot help it, but we object to his being employed." I find that as a fact, on the evidence before me, with reference to the attitude taken up by the clients; and I do not think that their attitude in any way derogates from their position taken upon October 14, namely, that they objected to the employment of this particular counsel.

I think that what the clients were told by the solicitors at the interview in question was erroneous. The solicitors were not, in my opinion, bound to employ this particular counsel, or, at any rate, bound in the sense that they were entitled to throw the costs of employing him upon the clients contrary to their express instructions. Whether they were bound, according to this particular rule, as a matter of etiquette between themselves and the counsel, I need not consider; but I think it is quite clear that they were not in any way bound in the sense which their clients would naturally understand. That being the case, can I say—which is really the point of the whole proceeding—that this counsel was briefed with the authority of the clients? He was the third counsel in the case, and he was briefed under the circumstances to which I have shortly referred. He was briefed, I think, against their wishes, and if they acquiesced at all they only acquiesced in his being briefed because they were told by the solicitors that they were bound to brief him. I do not think that there was any such obligation on them to brief this particular counsel, and that the proper course

for the solicitors to have pursued was the course which I suggested before, namely, to advise their clients that on instructing somebody else they were bound to state the facts and to give that somebody else an opportunity of acting upon the spirit of the rule, as all members of the profession must do if matters of etiquette are to be binding. But, beyond the profession, the rule has no operation at all.

Under these circumstances it appears to me that I must decide as a fact that the counsel was briefed against the directions and against the wishes and without the authority of the clients; and that being so—and I have already decided that what the taxing Master says on the question of law is no legal reason for allowing the fees—I think that the fees ought to be disallowed, and also all the costs of copying the documents with the particular brief, and everything else referred to in the objections. They are all on the same footing.

Solicitors for applicants: *Budd, Johnson & Jecks.*

Solicitors for respondents: *Church, Adams & Prior, for Emmerson & Co., Deal.*

F. E.

PARKER J.

1907

Nov. 16, 23.

SAVAGE *v.* NORTON.

[1906 S. 3630.]

Bank of England—Transfer of Stock—Execution by Person appointed to execute on neglect or refusal by Stockholder ordered to execute—Indemnity of Bank—Form of Order—Judicature Act, 1884 (47 & 48 *Vict. c.* 61), *s.* 14—*National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *ss.* 22, 66.

S. having recovered judgment against J. N. and R. N. in the King's Bench Division and obtained a charging order on stock standing in their respective names in the books of the Bank of England, commenced proceedings in the Chancery Division against J. N. and R. N. to obtain a sale of so much of the stock as would provide sufficient to pay the amount due under the charging order, and on June 29, 1907, Warrington J. made an order for sale by S. out of Court of portions of the stock, and that the proceeds should be received by S. in discharge of the amount found due to him, and that within seven days after service of the order J. N. and R. N. should transfer to S. the stock ordered to be sold, and in case they should neglect to do so, the Court appointed the Stock Exchange broker of the Court to execute the transfer, and ordered him to do so.

The Bank of England's advisers not being satisfied that it was protected by the order, the Bank was by arrangement joined as a defendant in the proceedings in the Chancery Division, and thereupon S. applied to Parker J. asking that, as J. N. and R. N. had neglected to transfer the stock, the Bank might be ordered to act on the order of June 29, and to suffer a transfer of the stock ordered to be sold to be executed in the books of the Bank by the Court broker, or, alternatively, for a fresh order for sale of the stock to satisfy the claim of S. The Bank objected (1.) that any order made should be intituled "In the matter of the Judicature Act, 1884"; (2.) that the Court could not, under s. 14 of that Act, make one anticipatory order for (*a*) execution of a transfer by stockholders, and (*b*) for execution of the transfer by some other person in case of non-compliance; and (3.) that it was not clear that, under an order framed in the manner proposed, the Bank would be entitled to any indemnity under the National Debt Act, 1870.

Held—(1.) that it was unnecessary and inconvenient to alter the title of the order by referring to the Act of 1884, although as a matter of convenience the order might state that it was made under s. 14 of the Act; (2.) that (without deciding that there was no case in which the Court could make an anticipatory order) before making an order under s. 14, the Court ought as a rule to be satisfied that the person originally ordered to execute a document had neglected or refused to comply with the order, and that in the present case an anticipatory order ought not

to be made; and (3.) that, as execution by the Court broker of the transfer would in effect be the act of the stockholders, the Bank would be indemnified under the National Debt Act, 1870.

The matter was subsequently brought before the Court, when the Bank urged (1.) that in a case like this there was no indemnity to the Bank; and (2.) that if the Bank was ordered to allow a transfer by the Court broker it should only be on a condition imposed under s. 14 of the Act of 1884 that S. should indemnify the Bank:—

Held—(1.) that when once an order had been made under s. 14, and acted on, the transfer executed by the appointed person had the same effect as if it had been executed by the stockholder, and the Bank was at any rate impliedly indemnified for acting on the order, even if the order turned out to have been invalidly made; and (2.) that, even if the condition asked for could be imposed under s. 14, it ought not to be imposed in the present case.

Form of order.

At the date of the charging order below mentioned there was standing in the name of Jane Ellen Norton, spinster, in the books of the Governor and Company of the Bank of England a sum of 300*l.* Two-and-a-Half per Cent. Consolidated Stock; and at the same time there was standing in name of Rosalie Norton, spinster, in the same books a sum of 299*l.* 13*s.* 7*d.* like stock.

In an action of *Savage* v. *Norton* [1906 S. 885], brought by Ernest John Savage in the King's Bench, he recovered judgment against the Misses Norton and obtained a charging order on the two sums of stock, which was made absolute on April 30, 1906.

Being unable to obtain payment of the amount recovered by him, Savage on October 16, 1906, took out an originating summons in the Chancery Division, in which he was plaintiff and Jane Ellen Norton and Rosalie Norton were defendants, "for an order that so much of the 2*l.* 10*s.* per cent. Consolidated Stock standing in the names of the said Jane Ellen Norton (spinster) and Rosalie Norton (spinster) in the books of the Governor and Company of the Bank of England as, when sold, will provide a sufficient sum to pay the amount due to the said Ernest John Savage under a charging order dated April 30, 1906, whereby the interests of the said Jane Ellen Norton and Rosalie Norton in the said sums of stock were charged in favour of the said Ernest John Savage, and to provide for the costs of this application, may be sold."

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In pursuance of an order of February 7, 1907, made in the proceedings in the Chancery Division, the Master, by his certificate dated April 22, 1907, certified that there was due to Savage, under and by virtue of the charging order, the sum of 231*l.* 18*s.* in respect of the judgment debt and costs, 2*l.* 12*s.* 6*d.* for costs of the charging order, and the sum of 9*l.* 12*s.* 8*d.* for interest (less property tax) upon the sum of 231*l.* 18*s.* at the rate of 4*l.* per cent. per annum from March 19, 1906, to the date of the certificate, and the sum of 28*l.* 1*s.* 4*d.* for the taxed costs of the plaintiff of the action, such sums amounting altogether to the sum of 272*l.* 4*s.* 6*d.*

On a summons in the action dated May 29, 1907, Warrington J., by an order dated June 29, 1907, ordered that the following further account should be taken, namely, "an account of what is due to the applicant"—Savage—"under and by virtue of the charging order absolute, dated, &c., and for his costs of this application and consequently thereon, to be assessed by the said Master, in addition to the amount found due by the Master's said certificate dated April 22, 1907, subsequent interest on the sum of 231*l.* 18*s.* mentioned in the said certificate being computed up to August 1, 1907." The order then proceeded as follows: "And it is ordered that the total amount so due to the plaintiff, including the amount found due" by the former certificate, "be certified. And it is ordered that the following inquiry be made, that is to say, an inquiry what amount of 2*l.* 10*s.* Consolidated Stock, if sold for the account day of August 1, 1907, will be sufficient to discharge all costs and broker's commission of sale, and the total amount due to the plaintiff to be certified as aforesaid. And it is ordered that the plaintiff be at liberty to sell out of Court, out of the said sums of 300*l.* and 299*l.* 13*s.* 7*d.*, 2*l.* 10*s.* per cent. Consolidated Stock standing in the books," &c., "in the respective names of the said Jane Ellen Norton and Rosalie Norton, such respective equal amounts of the said stock as shall be certified by the Master, the total of such respective equal amounts to be the amount found sufficient on taking the last-mentioned inquiry, and that the plaintiff receive the purchase-money in satisfaction of the amount found due to him as aforesaid. And it is ordered that, within seven days after service

of this order and of the Master's said certificate to be made in pursuance hereof, the said defendants Jane Ellen Norton and Rosalie Norton do transfer to the plaintiff the said respective amounts of the said stock to be so certified as aforesaid, and if the said defendants, or either of them, shall neglect so to execute such transfers within the time aforesaid, this Court doth appoint William Mortimer, Esquire, the Stock Exchange broker of the Court, to execute such transfer. And it ordered that he do execute such transfer accordingly." Liberty to apply.

By his certificate, dated July 20, 1907, the Master certified the total amount due under the charging order, including further costs, and interest to August 1, at 310*l.* 17*s.* 3*d.*, and that 370*l.* 1*s.* 6*d.* stock, if sold for the account day of August 1, 1907, would be sufficient to discharge that sum and all costs and broker's commission of sale, and that 185*l.* 0*s.* 9*d.* of the stock standing in the name of each defendant was the one equal part proper to be sold.

On August 22, 1907, the plaintiff's solicitor wrote to the accountant-general of the Bank of England a letter headed "*Savage* v. *Norton*," and saying that he was "desirous of registering order for sale of Consolidated Stock standing in the names of defendants, and dated June 29"; that this order was made pursuant to a charging order obtained in accordance with s. 14 of the statute 1 & 2 Vict. c. 110; that Mr. Mortimer was appointed to transfer, in the event of the defendants failing to do so; that "he is appointed pursuant to s. 14 of the Judicature Act, 1884"; and that the writer would be much obliged if the accountant-general would give instructions for the order to be duly registered.

Certain objections to acting upon the order having been pointed out by the Bank's advisers, an order was made on October 18, on the application of the plaintiff, that the Governor and Company of the Bank of England should be added as defendants to the action.

On November 6, 1907, the plaintiff took out a summons asking—(1.) that, the defendants J. E. and R. Norton having neglected or refused to transfer the stock, as required by the order of June 29, 1907, the defendants the Governor and Company

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of the Bank of England might be ordered to act upon the said order, and "to suffer a transfer to the plaintiff of the said respective amounts of 2*l.* 10*s.* Consolidated Stock out of the like stock standing in the respective names of the said defendants J. E. Norton and R. Norton to be executed in the books of the Governor and Company of the Bank of England by William Mortimer, Esquire, the Stock Exchange broker of the Court, the person nominated for that purpose by the said order of June 29, 1907; (2.) that the Governor, &c., might be ordered to pay to the plaintiff all dividends on the stock ordered to be transferred falling due after August 1, 1907, until the transfer had been duly entered in their books, and might be ordered to pay into Court to the credit of the action all other accrued dividends on the total amounts of stock then standing in the respective names of the defendants J. E. Norton and R. Norton, and also all such dividends as the Court might think fit accruing thereafter on such parts of the stock as was not ordered to be transferred by the order of June 29, 1907; (3.) that the costs of the application might be provided for; (4.) that in the alternative, and notwithstanding the order of June, the Court should make such order as it should think fit providing for the sale of such amounts of the stock standing in the respective names of the defendants J. E. Norton and R. Norton as should be deemed sufficient to provide for all costs and broker's commission of sale, the sum of 310*l.* 17*s.* 3*d.* found due to the plaintiff by the certificate of July 20, 1907, the subsequent interest falling due since August 1, and the costs of the present application, and that the proceeds of sale might be applied in discharging the same; (5.) that, if necessary, the originating summons and all subsequent proceedings in the action might be amended by being intituled "In the Matter of the Judicature Act, 1884," or, alternatively, "In the Matter of the Trustee Act, 1893."

The summons was adjourned into Court and heard by Parker J. on November 16.

Schwann, for the plaintiff. The Bank of England should be directed to give effect to the order of June 29, 1907. The Court can order a transfer of stock to be made on the happening of a

certain event: *In re Shortridge.* (1) In that case the order was made under the Lunacy Act, 1890, but the principle of the decision—that the multiplication of steps, entailing costs and inconvenience, should be avoided—is applicable to a case under the Judicature Act, 1884.

Howard Wright, for the Bank of England. It is the practice of the Bank to file and retain an office copy of the order made by the Court. *In re Shortridge* (1) shews that the Bank is entitled to have a "clean order," namely, one which shews on the face of it that the event has occurred on the happening of which it is to allow a transfer to be made. The order in the present case does not shew that the event has happened. The Bank desires to have a settled form of order applicable to other cases. The words "In the Matter of the Judicature Act, 1884," should be made part of the title of the order. The Bank ought not to have thrown on it the duty of making inquiries to see that everything precedent to the transfer has been regularly carried out, and it is submitted that the anticipatory form of order is wrong. Sect. 14 of the Judicature Act, 1884, provides that "where any person neglects or refuses to comply with a judgment or order directing him to execute any . . . . document . . . . the Court may . . . . order that such . . . . document shall be executed . . . . by such person as the Court may nominate for that purpose." That points to the jurisdiction to order execution by another person only arising when the neglect or refusal to comply has actually occurred. Sect. 66 of the National Debt Act, 1870, provides that "the Banks of England and Ireland and their respective governors, deputy-governors, and officers are hereby indemnified in respect of every transfer or re-transfer of stock or payment of dividends under this part of this Act, and shall not be in any manner responsible to any person having or claiming any interest therein"; but it is not clear that the Bank will obtain an indemnity under that section if it acts on the order in its present form.

Schwann, in reply. The proposed alteration in the title of the order is objected to. There is jurisdiction to make an anticipatory order. In Seton on Judgments, 6th ed. p. 1263, there is a form

(1) [1895] 1 Ch. 278.

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of order directing a conveyance on the happening of future events. The Bank may be entitled to have clear evidence that the neglect or refusal to comply has occurred, but it cannot insist on orders being in the form which suits it best. It is more convenient that one order only should be made.

Nov. 16. PARKER J. The latter part of the order, directing Mr. Mortimer to execute the transfer, seems to have been made under s. 14 of the Judicature Act, 1884.

There appears to have been a neglect or refusal on the part of the defendants who were directed in the former part of the order to make the transfer, and thereupon Mr. Mortimer proposed to do what was necessary to effect the transfer, and the Bank of England, not being satisfied that it was fully protected by the order, has by arrangement with the parties come here in order that I may make some order which will fully protect the Bank or decide that it is already protected by the order which has been made.

Now the objection of the Bank to this order is three-fold. In the first place, it is said that an order under s. 14 of the Judicature Act, 1884, ought to be intituled in the matter of that Act. I do not think that objection is tenable. The section appears to give the Court jurisdiction in certain events to make a certain order, and it is only, I think, where the proceedings in which the order is made are originating that any ground exists for inserting the title of the Act as part of the title of the order, and it appears to me that it would be exceedingly awkward in actions where orders have been made, and the records of which are under a certain title, that a new title should be introduced at a late stage of the proceedings for the purpose of one particular order. I hold, therefore, that it is unnecessary that an order made in exercise of the jurisdiction given by s. 14 should be intituled in the matter of the Judicature Act, 1884.

Of course, it may be convenient for the purposes of the Bank that in making and drawing up orders there should be inserted words making it clear what jurisdiction is being exercised, but that is a matter of convenience, and not of right. I say this because of certain remarks by Mr. Howard Wright, which went

to shew that for the Bank's purposes it would be convenient to refer to the jurisdiction.

The second objection is that the order authorizing a transfer to be executed by Mr. Mortimer was in anticipation of and not after a neglect or refusal. My own opinion is that, on the true construction of s. 14, the circumstance which gives rise to the jurisdiction is the neglect or refusal, and that the Court, before making the order, ought to satisfy itself that there has been a neglect or refusal and also as to the circumstances in which that neglect or refusal has taken place, because the order is only to be made "on such terms and conditions (if any) as may be just." Therefore, in making the order, the Court ought to know the circumstances of the refusal or neglect as well as the fact that there has been a refusal or neglect. The refusal may, for instance, have been due to some unforeseen cause, and the party all along may have been willing, and may still be willing, to comply, but may have been prevented by some accident—in which case I doubt whether the Court would, after considering the circumstances of the case, make any order.

I do not decide that there is no case in which the Court may make an anticipatory order, because it may be that the person ordered to transfer has in fact by his conduct already shewn the Court that he does and will refuse to do the act which is ordered to be done, in which case the Court may, shewing on the face of the order that there was that refusal, make an order at once in very much the same terms as those of the order in the present case. Under the circumstances I cannot say that there is no substance in the second objection, because an order in this form throws upon the Bank a duty of satisfying itself that there has been a neglect or refusal, and, although this particular case is a simple one in which the Bank can easily satisfy itself of the fact that there has been a neglect or refusal, in many cases that might be a more onerous matter.

The third objection appears to me to have no substance, and for this reason, that where transfers are made in accordance with the National Debt Act, 1870, the Bank has under that Act a full indemnity for acting on the transfers. Sect. 14 of the Judicature Act, 1884, says that the Court may order that "such conveyance,

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contract, or other document shall be executed, or that such negotiable instrument shall be indorsed by such person as the Court may nominate for that purpose; and in such case the conveyance, contract, document, or instrument so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it." Therefore it appears to me that whatever is done by Mr. Mortimer under this order is in effect an act done by the persons who were "originally directed" to do it within the meaning of the section, and therefore the indemnity of the Bank will come in. The Bank will, in effect, be protected in the same way as if the parties themselves had transferred, and will get the indemnity to which it is entitled under the National Debt Act, 1870. I propose to make an order that Mr. Mortimer, as the broker of the Court, do transfer to the plaintiff the sum of stock mentioned in the order of Warrington J.; that will be a pure order of transfer. It may be expressed on the face of the order that the order is pursuant to the power conferred by s. 14 of the Judicature Act, 1884. Then, the Bank being here, I will authorize or direct the Bank to give effect to the transfer.

As the Bank does not ask for its costs of these proceedings, the costs of the plaintiff will be assessed in chambers, and an inquiry what amount of stock, if sold, will be sufficient to pay the costs and what further amount is due under the judgment, as to which there will be a further account. The terms of the former order will be followed, except that I will not make an anticipatory order, but will give liberty to apply, in the event of failure for seven days to comply with the order, for an order under s. 14 of the Judicature Act, 1884. That order when made will be a clean order and will protect the Bank.

At the request of the Bank further proceedings against it were stayed.

Nov. 23, 1907. The matter was again brought before the Court.

Howard Wright, for the Bank. The part of the National Debt Act, 1870, giving an indemnity to the Bank only relates to the

Unpaid Dividends Fund, and has no bearing on the question before the Court. Whenever under statutory power the Bank has to suffer the transfer of A.'s stock by B., the statutory jurisdiction carries with it an express indemnity to the Bank if the order even purports to be made under the Act. In a case like the present no such indemnity is given; and if there was some irregularity, the Bank might be called upon to replace the stock transferred. Sect. 14 of the Judicature Act, 1884, enables the Court to impose "such terms and conditions (if any) as may be just," and it is submitted that it would be just to make it a condition of the order that the plaintiff should indemnify the Bank. The section has only once been used in the case of a transfer of stock to the Bank. Sect. 22 of the National Debt Act, 1870, points out the mode of transfer, and says that, "except as otherwise provided by Act of Parliament, no other mode of transferring stock shall be good in law." If the order on another person to transfer is made irregularly the transfer is invalid, and the Bank is placed under a liability against which it ought to be indemnified. The Bank ought not to be exposed to the risk of the proceedings being set aside for irregularity.

[PARKER J. I think you would still be protected by the implied indemnity under the Act if the order were set aside.]

If there is an implied indemnity under the Act of 1884, it seems difficult to see why an express indemnity should be given under the Trustee Act, 1893, and s. 333 of the Lunacy Act, 1890. The difficulty might be got over by making the order under s. 14 of the Act of 1884 and s. 35 of the Trustee Act, 1893, which provides that when a trustee neglects or refuses to transfer stock for twenty-eight days after service of an order for that purpose, the Court may make an order vesting the right to transfer in any such person as the Court shall appoint. The Court might declare the present holders of the stock trustees of the stock and then vest the right to transfer it in some other person.

Schwann, for the plaintiff, was not called upon.

PARKER J. Although, when the case was before me last, I was under the impression, and I think counsel were under the

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impression, that there was an express provision in the Act which governs the Bank in regard to Government stock, that if stock was transferred in the manner specified in the Act the Bank should be indemnified, yet I think that in reality everything I said on the last occasion is applicable, although there is no such express provision in the Act. When the Act says that the Bank of England is to enter in its books transfers of stock in a particular form signed by the stockholder, I do not think it can be doubted that if the Bank follows the directions which the Act gives, and everything is in order, it is really indemnified—if not expressly, at any rate impliedly—for what it does. Sect. 14 of the Judicature Act, 1884, provides that the "document or instrument so executed or indorsed"—that is to say, executed or indorsed by the person nominated by the Court for that purpose —"shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it"—that is, in the particular case, the stockholder. Therefore, when once an order has been made under the Act and acted on, the transfer or other instrument executed by the person whom the Court appoints to execute the same has precisely the same effect as if it had been executed by the person, in this case the stockholder, who has been directed to execute it. That will bring in, in favour of the Bank, the implied indemnity, to which I have already referred. The third objection with regard to indemnity therefore fails, and fails substantially for the reason which I stated in my former judgment. [His Lordship repeated the portion of his former judgment which dealt with the third objection, and proceeded:—] It is true that the indemnity to which I now refer is an implied and not an express indemnity, but I think my former judgment is substantially correct in that respect.

The other point, which Mr. Howard Wright now raises for the first time, is that, even if there be an implied indemnity, this is a case in which the Court ought to exercise its discretionary jurisdiction of imposing terms and conditions which may seem to the Court to be just, and he asks me to exercise that jurisdiction by imposing upon the plaintiff the obligation of giving the Bank an express indemnity for acting on the order. I do not

think—though I do not know that it is necessary to decide the point—that s. 14 of the Act of 1884 relates to the imposing of a condition for the benefit of a third party who may be affected if the order made by the Court is ultimately set aside. But, however that may be, I do not think it would be in accordance with the practice of the Court to throw doubt on its own order by ordering anybody to give an indemnity in case that order should turn out to have been wrongly made. Therefore I cannot in the present case impose any such condition as is asked for.

The order as drawn up (Mr. Bloxam, registrar, Fo. 142) was intituled in the action only, and, so far as material, was as follows:—

The application of the plaintiff by summons dated, &c., and upon hearing counsel, &c., and upon reading, &c., and "a letter from the chief accountant of the Bank of England addressed to Thomas A. Romer, Esquire, a Master of the Supreme Court, and it appearing by the said letter that no part of the sums of 300*l.* and 299*l.* 13*s.* 7*d.*, 2*l.* 10*s.* per cent. Consolidated Stock mentioned in the said order of June 29, 1907, had since the date of the said order been transferred in the books of the Governor and Company of the Bank of England out of the respective names of the defendants [naming the original defendants], And this Court being satisfied by the evidence aforesaid that all persons interested in the said sums of, &c., are before the Court, and that the defendants [naming original defendants] have neglected or refused to comply with the said order, dated, &c., by transferring to the plaintiff the respective amounts certified by the said certificate dated July 20, 1907, namely, 185*l.* 0*s.* 9*d.* and 185*l.* 0*s.* 9*d.*, 2*l.* 10*s.* per cent. Consolidated Stock out of the amounts of the like stock standing in their respective names in the books of the Governor, &c. This Court doth order that, pursuant to the said order dated June 29, 1907, and to s. 14 of the Judicature Act, 1884, William Mortimer, Esquire, the Stock Exchange broker of the Court, do execute a transfer to Ernest John Savage, the plaintiff, of an amount of 185*l.* 0*s.* 9*d.*, 2*l.* 10*s.* Consolidated Stock out of the like stock standing in the name of the defendant Jane Ellen Norton in the books of, &c., and an amount of 185*l.* 0*s.* 9*d.* like stock out of the like stock standing in the name of the defendant Rosalie Norton in the said books. And doth authorize and direct the defendants the Governor, &c., to suffer such transfer to be executed accordingly. And it is ordered that all further proceedings in this action against the defendants the Governor, &c., be stayed except so far as may be necessary for carrying this order into effect. And it is ordered that the following account and inquiry be taken and made, that is to say: (1.) An account of what is due to the applicant under and by virtue of the charging order absolute dated, &c., and for

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his costs of this application and consequent thereon, to be assessed by the said Master, including therein the amounts found due by the Master's said certificates dated respectively April 22, 1907, and July 20, 1907, and subsequent interest to January 1, 1908, and in taking such account what the applicant shall receive after discharging broker's commission and costs of sale from the proceeds of sale of the said amounts of 185*l.* 0*s.* 9*d.* and 185*l.* 0*s.* 9*d.*, 2*l.* 10*s.* per cent. Consolidated Stock being ordered to be transferred to him and directed by the said order dated June 29, 1907, to be sold by him out of Court shall be deducted and the balance due to the applicant certified; (2.) an inquiry what amount of 2*l.* 10*s.* per cent. Consolidated Stock, if sold for the account of January 1, 1908, will be sufficient to discharge all costs and broker's commission of sale, and the total amount due to the applicant to be certified as aforesaid. And it is ordered that the plaintiff be at liberty to sell out of Court out of the said sums of 300*l.* and 299*l.* 13*s.* 7*d.*, 2*l.* 10*s.* per cent. Consolidated Stock standing in the books, &c., in the said respective names of, &c., such respective equal further amounts of stock as shall be certified by the Master, the total of such respective equal further amounts to be the amounts found sufficient on taking the last-mentioned inquiry. And it is ordered that the applicant do receive the purchase-money in satisfaction of the amount found due to him as aforesaid. And it is ordered that the defendants Jane Ellen Norton and Rosalie Norton, within seven days after the service of this order and of the Master's said certificate to be made in pursuance hereof, transfer to the applicant the said respective amounts of the said stock to be so certified as aforesaid. And if the said defendants or either of them shall neglect or refuse to execute such transfer within the time aforesaid, the applicant is to be at liberty to apply in chambers that a person may be nominated under s. 14 of the Judicature Act, 1884, to execute such transfer. General liberty to apply.

Solicitor for plaintiff: *W. Crawford Ely.*

Solicitors for the Bank: *Freshfields.*

F. E.

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[1906 J. 926.]

Oct. 30, 31; *Nov.* 5, 6, 28.

Married Woman—Real Estate—Mortgage—Separate Examination—Acknowledgment—Burgage Tenure—Custom—Reasonableness—Fines and Recoveries Act, 1833 (3 & 4 *Will.* 4, *c.* 74), *s.* 77.

Action by a married woman to set aside a mortgage of her real estate on the ground that it had been executed by her husband and herself without having been acknowledged by her. The defendants alleged that the property was held on burgage tenure, and that a local custom existed under which real estate so held by a married woman could be disposed of by her with the consent of her husband without her separate examination and acknowledgment:—

Held, that such a custom was inconsistent with the general principle of the common law that an exercise of free will was essential to alienations and contracts and that a married woman was not in a position to exercise that free will; that the custom was therefore unreasonable and bad; and that the mortgage was void and did not operate to pass the plaintiff's interest in her land.

Action by a married woman for a declaration that a deed of June 11, 1891, did not operate to pass her interest in real estate, situate at Kendal, inasmuch as she had not been separately examined before executing it.

The following statement of facts is taken substantially from the judgment of Parker J.

The plaintiff married on December 4, 1877, being at that date entitled under her father's will to a life interest in certain lands of burgage tenure situate in the borough of Kendal. A settlement was made on the occasion of her marriage, but that settlement did not affect her life interest under her father's will. Under it, however, she took a life interest in other property for her separate use without power of anticipation. There was no evidence that she ever possessed any other separate property. In 1887 the plaintiff's husband was in pecuniary difficulties, due to speculations on the Stock Exchange, and the plaintiff joined with him in mortgaging her life interest in the Kendal property, first to the Westmoreland Bank, and secondly to Gurney's Bank, to

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secure moneys due from her husband to those banks respectively. Each mortgage was effected by a deed of grant by the husband and wife, and the latter was not separately examined under the Fines and Recoveries Act or otherwise. Mr. Robinson, one of the trustees of the will of the plaintiff's father, collected the rents of the Kendal property for the plaintiff or her husband, and after the mortgages, by their instructions or the instructions of the wife, he paid the net rents of the property to the Westmoreland Bank until November 12, 1890, by which date that bank's mortgage was discharged. After November 12, 1890, Mr. Robinson, on the like instructions, commenced to pay the net rents to Gurney's Bank in a similar manner.

Meanwhile, on September 3, 1887, the plaintiff joined her husband in giving the defendant Clark a joint and several promissory note for 500*l.*, and on February 22, 1889, and September 5, 1889, accepted or indorsed bills drawn by her husband for 500*l.* and 200*l.* respectively, both of which came into the hands of Clark.

On February 10, 1890, the plaintiff's husband filed his petition, and was shortly afterwards adjudicated a bankrupt. His estate only paid 2*d.* in the pound, and he had not yet obtained his discharge. Clark proved in the bankruptcy for the amount due on the promissory note and bills above mentioned. The plaintiff's husband was a cattle dealer and Clark was a butcher. They had come across each other in business, and were great friends. Clark had assisted the plaintiff's husband on many occasions.

After the bankruptcy the plaintiff and her husband mortgaged her interest in the Kendal property to a Mr. Wilson, the plaintiff's solicitor, to secure certain costs. This mortgage, which was dated July 16, 1890, was also effected by deed to which both husband and wife were parties, but the husband was not in this case, as in the case of the earlier mortgages, a conveying party, probably because of his bankruptcy. The plaintiff was not separately examined. The defendant Clark wanted a similar security for the amount due to him on the promissory note and bills, and after a long negotiation the plaintiff and her husband executed the indenture of June 11, 1891, which the plaintiff now

sought to have declared void or set aside. It was an indenture similar in form to the mortgage to Wilson, the conveying party being the plaintiff with her husband's concurrence.

There was not in this case, any more than in the case of the previous mortgages, any separate examination of the plaintiff. The mortgage of June 11, 1891, came into the possession of Clark under circumstances which, the plaintiff alleged, proved that it was only delivered as an escrow. He created a sub-mortgage on his interest under this indenture in favour of Arthur Titchmarsh, who was also a defendant, and it was admitted that as against the latter the indenture could not be set aside upon the ground of any equities between Clark and the plaintiff.

The defendants contended that by the custom of Kendal a married woman by her husband's consent could dispose of her hereditaments of burgage tenure by deed without separate examination.

Hume-Williams, K.C., and *H. Wace*, for the plaintiff. The mortgage of June 11, 1891, is void as against the plaintiff, inasmuch as it was not acknowledged by her after separate examination. It is said that by a local custom real estate belonging to a married woman can be conveyed by her with the concurrence of her husband without her separate examination; but no such custom has been proved to exist. Another objection to the alleged custom is that the husband is a bankrupt, and there cannot be a custom which would defeat the title of the trustee in bankruptcy to the equity of redemption of the husband's interest.

On general grounds such a custom cannot be supported. By s. 77 of the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), a married woman can with her husband's concurrence dispose of her real estate by deed acknowledged by her, and it is true that by s. 78 the powers of disposition given to a married woman by that Act were not to interfere with any other powers. But the chief point is that this custom is bad because it is contrary to the whole policy of the common law with respect to married women, and is therefore unreasonable. A custom must be certain, reasonable in itself, commencing from time immemorial

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and continuous: Carson's Real Property Statutes, p. 32. In all customs under which married women had power of alienation some sort of separate examination and acknowledgment was necessary: Comyns' Digest, 5th ed. vol. ii. p. 233, G. 4; Scriven on Copyholds, 7th ed. p. 90. There is direct authority that a custom under which a married woman can dispose of copyholds without acknowledgment is bad: *George* v. *Jew* (1); and that a custom by which a man and his wife could pass land in London without acknowledgment would also be bad: *Needler* v. *Bishop of Winchester*. (2) It is said that *Skipwith's Case* (3) is an authority for saying that a custom for a married woman to dispose of interests in realty with her husband's concurrence and without separate examination may be good; but a careful consideration of the reports of that case shew that no such rule was laid down. Burgage tenure is tenure in socage, and there is nothing in it to warrant such a custom: Co. Litt. 108 b. A custom for a feme covert to surrender her copyhold lands without the assent of her husband is bad: *Stevens* v. *Tyrell* (4); Carson's Real Property Statutes, p. 326.

Whether a custom is reasonable or not depends to a great extent on public policy. If it is contrary to public policy it cannot be supported.

[PARKER J. It cannot be said to be against public policy that a married woman should be able to dispose of real estate without examination, for the Court of Chancery allowed her to do so.]

She could not have done so at the period when this custom must be assumed to have been established. Public policy varies from time to time, and affects local customs in different ways at different times. A custom need not be good now because it was good in the reign of King John.

[PARKER J. The question is whether the custom was good at its inception: *Mercer* v. *Denne*. (5)]

No doubt the custom must have been good when it originated, but it must also have been continuous; therefore it must also be legal at the time when the question comes before the Court. A

(1) (1764) Amb. 627.
(2) (1619) Hob. 220, 225.
(3) (1582) Moore, 123, case 268; Godbolt, 14, case 22; 3 Leon. 81.
(4) (1753) 2 Wils. 1.
(5) [1904] 2 Ch. 534, 557.

custom which enabled an infant to sell lands held on burgage tenure when he could count twelve pence or measure yards of cloth was held to be void for uncertainty although it had been good originally: Robinson's Customs of Gavelkind, 3rd ed. p. 285.

The common law considered that the husband and wife were one person. The acts of the wife with respect to her real estate, except so far as she was enabled by Act of Parliament, were the acts of the husband. That is historically the original cause of separate examinations: Pollock and Maitland's History of English Law, 2nd ed. vol. ii. p. 413, note. The principle is that a married woman must be protected from any possibility of her interest in real estate being affected by the act of her husband: *Nicholl* v. *Jones*. (1) Logically that protection ought to have been extended to her separate estate, but it appears that husband and wife were not looked upon as one person in respect of separate estate: *Cahill* v. *Cahill*. (2)

If the Court should be of opinion that this mortgage is valid, we submit that the evidence shews that it was executed as an escrow, and the condition has not been fulfilled. It was not necessary to say at the time that it was delivered as an escrow; the question is one of the intention of the parties: Norton on Deeds, pp. 16, 17. Therefore the defendant Clark must carry out the bargain or give up the deed.

It is said that the plaintiff ratified or acquiesced in the transaction; but that would be inconsistent with the law as to separate examination. Specific performance of the agreement to give a mortgage could not be enforced against the wife nor against her husband: *Castle* v. *Wilkinson*. (3) The relief claimed will not interfere with the rights, if any, of the trustee in bankruptcy of the plaintiff's husband; but we submit that he has none: *In re Jakeman's Trusts*. (4) The promissory note and the bills were not binding on the plaintiff: *Palliser* v. *Gurney* (5); *Stogdon* v. *Lee*. (6)

W. F. Hamilton, K.C., and *Owen Thompson*, for Clark. The custom has been amply proved by the evidence in this case. It

(1) (1866) L. R. 3 Eq. 696, 708.
(2) (1883) 8 App. Cas. 420, 425, 438.
(3) (1870) L. R. 5 Ch. 534.
(4) (1883) 23 Ch. D. 344.
(5) (1887) 19 Q. B. D. 519.
(6) [1891] 1 Q. B. 661.

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was accepted and discussed many years ago in *Busher* v. *Thompson* (1), although the question of its validity was not determined. It is a reasonable custom. In Chancery the separate examination of married women has never been required in respect of property settled to their separate use. The time at which it must be found to be reasonable is the time of its origin: Co. Litt. 112 b, note 2. Formerly the wife used to join in her husband's disposition of her lands without any fine: Cruise on Fines and Recoveries, 3rd ed. vol. i. p. 107; Pollock and Maitland's History of English Law, 2nd ed. vol. ii. p. 411. At that date the policy of the law was that the heir should inherit, but customs which enabled a man to devise his lands by will were good: Co. Litt. 111 a; Goodeve's Modern Law of Real Property, 3rd ed. p. 377. The fact that local customs differ from the common law, which is nothing more than general custom, does not shew that they are unreasonable. The authorities which have been referred to contain merely dicta; or they were decided on the ground of the uncertainty of the alleged custom; or they were questions of copyholds. There is no case directly in point except *Skipwith's Case* (2), and that is in our favour. The custom we support is not necessarily bad because other inhabitants of Kendal have used different forms of conveyances: *Mercer* v. *Denne*. (3)

Harman, for the defendant Titchmarsh, submitted to act as the Court might direct.

Hume-Williams, K.C., in reply, referred to *Leak* v. *Driffield* (4) and *Brown* v. *Dimbleby*. (5)

Cur. adv. vult.

Nov. 28. PARKER J. delivered a written judgment, in which, after stating the material facts and adding that, having regard to the decisions in *Palliser* v. *Gurney* (6) and *Stogdon* v. *Lee* (7), it could not be said that, so far as the plaintiff was concerned, the promissory note and bills had any effect whatever, his Lordship proceeded:—Unless the indenture of June 11, 1891, is void,

(1) (1846) 4 C. B. 48.
(2) Moore, 123, case 268; Godbolt, 14, case 22; 3 Leon. 81.
(3) [1904] 2 Ch. 534, 551.
(4) (1889) 24 Q. B. D. 98.
(5) [1904] 1 K. B. 28.
(6) 19 Q. B. D. 519.
(7) [1891] 1 Q. B. 661.

I do not think the circumstances are such that the Court could deprive Titchmarsh of the interest he took by virtue of the sub-mortgage. If, however, the indenture is void against the plaintiff, the sub-mortgagee has no interest under the sub-mortgage. I propose, therefore, to consider first whether as against the plaintiff the indenture in question is altogether void.

Now the indenture of June 11, 1891, not having been acknowledged in manner required by the Fines and Recoveries Act, is undoubtedly void at common law so far as it affects to deal with the plaintiff's interest in the Kendal property. It is alleged, however, that the indenture is good as to the plaintiff's interest in the property by virtue of the custom of burgage tenure in Kendal. I have to consider, therefore, first, whether a local custom for a married woman to dispose of her real estate by deed, made with the concurrence of her husband, but without any separate examination, can be a good custom; and, if so, secondly, whether such a custom has been proved in the present case. This seems to me to be the proper order to be pursued in dealing with the questions which arise, because it is clear that no custom bad in law is susceptible of proof. As Lord Cranworth said in *Marquis of Salisbury* v. *Gladstone* (1): "When it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom." On the other hand, it seems clear that a custom possible in law, because it is reasonable and otherwise fulfils the requisites of a good custom, may be established by very slender evidence.

It is quite clear that in the case of copyholds a custom for a married woman, with the concurrence of her husband, to surrender her interest, after separate examination before the lord or the steward of the manor or his deputy, or even before two tenants of the manor, is a good custom. Similarly, in the case of freeholds a custom for a married woman to dispose of her interest by grant or bargain and sale made with the concurrence of her

(1) (1861) 9 H. L. C. 692, 701.

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On the other hand, there are two authorities which clearly contain an expression of judicial opinion against the validity of such a custom. The first authority is the case of *Needler* v. *Bishop of Winchester*. (2) In that case the Lord Chief Justice of the Common Pleas, in speaking of the custom of the City of London, says: "So if the man and his wife pass the wife's land in London, and she be examined (note, for else the custom were void in law), it binds her by the custom of London." The second authority is *George* v. *Jew*. (3) In that case the husband and wife had mortgaged copyholds of the wife by demise for ninety-nine years. Willes C.J. says: "As to the mortgage, it must be bad at all events; for there ought to have been either a fine or surrender, so as the feme might be privately examined;

(1) Moore, 123, case 268; Godbolt, 14, case 22; 3 Leon. 81.

(2) Hob. 220, 225.

(3) Amb. 627, 629.

for a custom to bar without surrender or private examination would be bad."

Looking at the matter apart from express authority, it is quite clear that for a custom to be good it must be reasonable or, at any rate, not unreasonable. The words "reasonable or not unreasonable" imply an appeal to some criterion higher than the mere rules or maxims embodied in the common law, for it is no objection to a custom that it is not in accordance with these rules or maxims. On the other hand, it is not the reason of the average human being to which appeal is made. Littleton says of customs: "Whatsoever is not against reason may well be admitted and allowed"; and on this Sir Edward Coke comments: "This is not to be understood of every unlearned man's reason, but of artificiall and legal reason warranted by authority of law": Co. Litt. 62 a. If this be so, it appears to follow that a custom to be valid must be such that, in the opinion of a trained lawyer, it is consistent, or, at any rate, not inconsistent, with those general principles which, quite apart from particular rules or maxims, lie at the root of our legal system. Thus a custom which is for the advantage of an industry or trade may be good, although it bear hardly on the individual; while, on the other hand, a custom which is for the advantage of the individual only and is prejudicial to the public, or a class of the public, is bad; for the common law, in principle, imposes obligations on the individual for the benefit of the public, and not on the public for the benefit of the individual. Again, take a custom for an infant to dispose of his real estate. In pleading such a custom it is necessary to state definitely the age at which this may be done; and a custom for an infant to dispose of his real estate as soon as he could count twelve would be a bad custom. This is sometimes put on the ground of uncertainty, but there is another reason, namely, that the Court must consider whether the age at which the custom permits an infant to dispose of his realty is an age of discretion, for "custom"—as it is put in *Needler* v. *Bishop of Winchester* (1), above referred to—"must not deprive the law of nature." Lawyers of to-day do not refer to the law of nature as freely or

(1) Hob. 220, 225 (see further at p. 317, post).

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confidently as lawyers did centuries ago; but, translated into more modern phraseology, I think this means that a custom for an infant of, say, two years, to dispose of his realty, even though he could count twelve, would be a bad custom, because an infant of two years could not have the discretion or judgment necessary, according to the principles of our common law, for any voluntary alienation of property. In other words, the custom would be unreasonable because inconsistent with the principles governing all voluntary alienations at common law.

Once again, it is sometimes said that a custom is bad as being against "common right," meaning, as I conceive, that it is inconsistent with some general principle as opposed to some particular rule or maxim of the common law. And it is to be observed that among the customs collected in Comyns' Digest, 5th ed. vol. iii. p. 230, Copyhold, Custom, s. 16, as bad on this ground, are the following: (1.) That a feme covert may make a devise of her land, and (2.) that a wife shall have property of a certain part of the husband's goods during coverture and dispose of them without her husband. The reason why such customs are said to be "against common right" will, I hope, appear in the following parts of this judgment.

If I have correctly stated the test of reasonableness in connection with the doctrine that a custom to be valid must be reasonable, or, at any rate, not unreasonable, it is evident that the test cannot be applied to the custom alleged without considering the principles underlying the common law so far as it relates to the capacity of married women. It would, I think, be wrong to say that at common law a married woman was looked upon as subject to any personal incapacity which precluded her from being able to exercise judgment or free will. A married woman was at common law capable of exercising powers of various kinds. "If," says Sir Edward Coke (Co. Litt. 112 a), "cestuy que use had devised that his wife should sell his land, and made her executrix, and dyed, and she tooke another husband, she might sell the land to her husband, for she did it in auter droit, and her husband should be in by the devisor." This, however, might not hold where the power was coupled with an interest, for the power would

not be exercised in auter droit, but by virtue of the interest. At the same time, by the theory of marriage, the wife's personality merged for many purposes in that of her husband, so that most of her acts, if valid at all, were valid only as his acts. The very words of the writ in which a widow sought to recover her lands against her own or her husband's alienees, "Cui ipsa in vita sua contradicere non potuit," shew that her alienations were not looked upon as her own free acts; and the same may be said of her contracts, unless she were contracting in auter droit, for example, as agent for another. It is to be noticed that the allegation contained in the words of the writ above referred to did not require proof. The words containing it merely stated the result at common law of the marriage, and, except as hereinafter mentioned, could not be rebutted by any evidence whatever. Marriage, therefore, must by common law have implied, on the part of the wife, such a complete surrender of her will to the will of her husband that thereafter during the coverture, except when acting in auter droit, she was, if not incapable of exercising, at any rate presumed not to be exercising that free will which is, according to the principles of the common law, necessary to voluntary alienation or contract. This presumption cannot be explained as designed to protect the rights of the husband only, for, even where the husband concurred in the alienation or contract, the heir of the wife was not bound. To displace the rights of the heir there was required an act of free will on the part of the wife, and such act was ex hypothesi, if not absolutely impossible, at any rate presumed not to have existed, unless this presumption could, in certain exceptional cases, be rebutted in a manner recognized by the law.

With regard to the interests of married women in real estate, with which we are now particularly concerned, there was a way in which the presumption I have referred to could be displaced. One of the recognized methods of conveying real estate was a fine. A fine was a compromise of an action, real or fictitious, made solemnly in open Court, and a title under such a compromise was not only a title of record, but was surrounded with all the prestige and security which the King's Court alone could

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give. A fine was a recognized mode of alienating realty from very early times. Sir Edward Coke (Co. 2nd Inst. p. 511) says it is certain fines were frequent before the Conquest. Pollock and Maitland, in their History of English Law, doubt this, but they find evidence of the existence of fines shortly after the Conquest, though not perhaps precisely in the form which they finally assumed. At any rate, from 1175 A.D. onwards there is ample evidence of their existence: Pollock and Maitland's History of English Law, vol. ii. pp. 94-97. Thus a fine was a recognized mode of conveying real estate before 1189, the 1st year of Richard I., from which the period of legal memory commences. No fine could be levied without the leave of the Court, and in very early times such leave was refused where a married woman was concerned, unless she had been first separately examined by the justices. It is true that there are early instances of fines in which the wife appeared by her husband as her attorney, and therefore could not have been separately examined. This is not unnatural at a time when the law as to the status of a married woman, the effect of a fine, and the procedure to be adopted were as yet unsettled. But before the 18th year of Edward I. the practice of the King's Courts was not to permit a fine to which a married woman was a party, unless she had first been separately examined. The document of 18 Edward I., known as the Modus levandi fines (Co. 2nd Inst. p. 510), which is sometimes referred to as a statute, states in detail the practice of the Court with reference to fines, and refers to the impossibility of a married woman being a party unless she assent thereto after separate examination by four of the justices. If after such examination she do not assent, the fine will not be levied. This document may, I think, be taken as shewing the practice of the King's Court in the reign of Edward I., a practice which had, no doubt, grown up in the course of the preceding two centuries. Sir Edward Coke's comment on the point is as follows: "The examination," he says, "must be solely and secretly, and the effect thereof is, whether she be content of her own free good will without any menace or threat to levy a fine of these parcels": Co. 2nd Inst. p. 515. He also says that whether the wife be examined or not, if the fine be received,

neither she nor her heirs can aver that she was not separately examined, for this would be against the records of the Court and tending to the weakening of the general assurances of the realm: Ibid.

I think it may be inferred from the history of fines that our common lawyers never doubted the personal capacity of a married woman to act of her own free will. There was, however, no doubt a presumption that, except when acting in auter droit, she never did exercise free will, such presumption being based on the common law theory of marriage. In allowing the presumption to be rebutted in exceptional cases the common lawyers did not in any way contradict their own principles. They merely allowed what was really only presumption of fact to be rebutted under exceptional circumstances, at the same time taking care that the evidence rebutting the presumption was as cogent as possible. They found such evidence in the result of an examination before the King's justices entered on the records of the King's Courts. It became, therefore, possible for a married woman to dispose of her real estate notwithstanding the common law presumption arising out of the common law theory of marriage. It is possibly due to the comparative unimportance of personal property in early times that no similar method of disposition was evolved in the case of a married woman's interests in personalty.

Contemporaneously with the development of the fine as a method of alienating land, there grew up in various manors and townships other customary forms of alienation, these also involving in the case of married women a separate examination directed to ascertain and establish, without the possibility of a doubt, that in alienating her interests in real estate she was acting of her own free will. Judging by the history of the fine, it is quite clear that such customary forms of alienation would not seem unreasonable to the common lawyer, provided the examination were such as to be sufficiently cogent evidence of the fact sought to be established, namely, that, notwithstanding the presumption of the common law, the married woman was exercising that free will which is necessary to all voluntary alienations. Customs for a wife to dispose of her realty by deed

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or surrender, with her husband's concurrence and after separate examination, have always therefore been deemed good customs. I do not, however, think that this fact, any more than the history of the fine, can properly be adduced as evidence that a custom for a married woman to dispose of her realty by deed with her husband's concurrence, but without any form of separate examination, is a good custom. I am, on the contrary, of opinion that a lawyer, conversant with the principles of our common law, would consider such a custom as in reality a custom for a married woman to dispose of her realty without any such exercise of free will as is necessary to all voluntary alienations at common law. For the common law theory of marriage would prevail in the local area in which the custom was alleged as in the realm generally; the results of marriage in such area would be the same, and there, as elsewhere, the words of the writ, "Cui ipsa in vita sua contradicere non potuit," would be equally applicable.

In illustration of the view which a lawyer conversant with the principles of English law would be likely to take in this matter, I cannot do better than revert again to the case of *Needler* v. *Bishop of Winchester* (1), to which I have already referred. In that case Robert Southwell and his wife, being seised to them and the heirs of Robert of the rectory of Horsham, granted it by deed to the King, the wife, of course, undergoing no form of separate examination. In consideration of such grant the King granted to Robert Southwell and his wife, and the heirs of Robert, the rectory of Horley. The question was as to the validity of the King's grant, that is to say, whether it was made on a good and true consideration. So far as the husband was concerned the grant to the King of the rectory of Horsham was held to be either good at common law, or, if defective at common law, rendered good by a certain statute of 34 Henry VIII. But the wife was dowable, and so far as her interest was concerned the grant was absolutely void at common law. Was this a defect cured by the statute in question? It was held not, for such a statute was never meant to enable those persons, "who by natural disease or

(1) Hob. 220, 224, 225.

disablements were either by the law of nature or the law of the land disabled, to grant," and a married woman, by the law of nature, is said to want free will, as an idiot or lunatic wants judgment. The Lord Chief Justice then continues: "And yet the law of the land for necessities sake, of commerce and the like, by a law of policy, makes bold with this law of nature in a special kind; and therefore allows a fine levied by the husband and the wife, because she is examined of her free will judicially by an authentical person trusted by the law and by the King's writ, and so taken in a sort as a sole woman." Inasmuch as the defect of the wife's conveyance was not cured by the statute, it followed that the consideration for the King's grant was bad, and the King's grant therefore void at common law, though the defect at common law in the King's grant was subsequently held to be cured by another statute. I may also refer in this connection to the case of *Doe* v. *Bartle* (1), in which, for somewhat similar reasons, it was held that the Act of 55 Geo. 3, c. 192, as to supplying surrenders to the uses of a will, did not apply to a married woman, on the ground that the validity of such surrender would depend on whether there had been a separate examination to ascertain that she was acting freely, and it would be unreasonable to suppose that the Legislature meant to dispense with so important a matter.

In the course of the arguments the fact that equity has never insisted on the separate examination of married women as a condition of their dealing with property settled to their separate use was referred to as shewing that in the contemplation of a Court of Equity there could be nothing unreasonable in such a custom as is alleged in the present case. At first sight it is no doubt rather puzzling to find that equity allowed the wife a right of disposition over property settled to her separate use, and did not attempt to protect her by insisting on a separate examination, while in the case of the equity to a settlement, which as a matter of history developed contemporaneously with the doctrine of the separate use, a married woman could only waive it after separate examination. But all difficulty is removed if we regard the separate use (and historically I think

(1) (1822) 5 B. & Al. 492.

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we are justified in so regarding it) as a development of the common law principle that a married woman acting in auter droit was as competent as a feme sole. The separate use is created by the settlor, and the test of the powers of a married woman with regard to her separate property is the will of the settlor. As Lord Westbury puts it in *Taylor* v. *Meads* (1), "with respect to separate property, the feme covert is, by the form of trust, released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is sui juris." Her acts with reference to her separate estate are acts in the nature of the exercise of powers conferred on her by the instrument creating the trust, and to allow her husband any voice in the matter would be contrary to the direction of the settlor, who has declared that she shall have the powers of a feme sole. On the other hand, in the case of the equity to a settlement, the wife's interest is an equitable interest in property which at law belonged to her husband, and the Courts of Equity were guilty of no inconsistency in following the analogy of the common law and not allowing such interest to be waived without a separate examination to see that the wife was acting freely, and not merely under the influence of a person "Cui ipsa in vita sua contradicere non potuit." The restraint on anticipation, which was a late addition to the doctrine of the separate use, and designed to protect married women against their husbands in dealings with their separate estates, may perhaps be looked upon as a tribute on the part of the Courts of Equity to the wisdom of the common lawyers.

I have come to the conclusion, therefore, that the alleged custom cannot be upheld, because it is unreasonable, as conflicting with the general principle of the common law that an exercise of free will was essential to alienations and contracts, and that a married woman was not in a position to exercise such free will. Such a custom would, in other words, be against "common right."

Under these circumstances I need not deal with the evidence adduced in support of the custom, beyond saying that had I been of opinion that the custom was a good one I should probably have come to the conclusion that it was sufficiently proved.

(1) (1865) 13 W. R. 394.

In view of the possibility that this case may go further, I ought, I think, to say a few words on the facts which, according to the plaintiff's contention, give rise to her right to have the conveyance of June 11, 1891, set aside, irrespective of any question of its validity at common law.

[His Lordship then went into the general facts of the case, and came to the conclusion that the mortgage of June 11, 1891, was never delivered to Clark otherwise than for the purpose of enabling him to raise money for the benefit of the plaintiff's husband, and was not intended to operate until the money had been so raised; that no money had been raised for this purpose, and therefore that the mortgage could not stand as any security to Clark. The sub-mortgagee, however, was in a better position, and as against him the plaintiff had no equity to have the deed set aside, having by her own action put it in the power of Clark to create the sub-mortgage, and the sub-mortgagee having taken without notice of any equity between her and Clark. But this distinction, having regard to his Lordship's decision on the point of law, was of little importance. His Lordship concluded as follows:—]

I propose, therefore, to declare that the deed of June 11, 1891, was void as to and did not operate to pass any estate or interest of the plaintiff in the hereditaments in the statement of claim mentioned, and to order the defendant Titchmarsh to produce the deed to the plaintiff's solicitors for an indorsement thereon of a copy of this order. I propose further to direct Clark to pay the plaintiff's costs of action, leaving Titchmarsh to add his costs to his security as between himself and Clark.

Solicitors: *Loxdales; Mackrell & Ward, for H. J. Whitehead & Son, Cambridge; Sharpe, Parker, Pritchards, Barham & Lawford, for George A. Wootten, Cambridge.*

H. C. R.

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In re COULDEN.
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[1907 C. 1352.]

Will — Construction — "Surviving Children and their respective Issue" — Alternative Original Gift of Personalty—Issue competing with Parents.

Although in a gift of real estate to A. and his issue the word "issue" is prima facie a word of limitation, there is no like rule of construction as regards gifts of personal property, in which case it is a question of construction on each particular instrument. Such words as "and their issue" or "and their respective issue" may be read as meaning either an alternative substitutional gift or an alternative original gift.

A testator died in 1884, having then seven children. By his will he directed the income of his real and personal estate to be divided into seven equal parts, and each one-seventh to be paid to a child. The testator appointed two of his sons executors and trustees, and directed that on the death of either executor the survivor should "sell the whole of my real and personal estate and cause the same to be equally divided amongst my then surviving children and their respective issue."

One son and executor died in 1907 without leaving issue. Two children of the testator died between 1884 and 1907 leaving children who survived the deceased executor. Other children survived the deceased executor and had children living:—

Held, that the estate was divisible into as many shares as there were children of the testator who either survived the deceased executor or died before him leaving issue who so survived; that each surviving child of the testator took one share (his own issue not being allowed to compete with him); and that the surviving children of each child of the testator who predeceased the deceased executor took the share which their deceased parent would have taken had he survived that executor.

John Harrison Coulden died in January, 1884, having by his will (dated June 9, 1883), after giving certain legacies, devised and bequeathed to his sons John Coulden and George Coulden, "Upon trust, the remainder and residue of my estate both real and personal of whatsoever nature or kind soever whether in possession or expectancy." The will then proceeded as follows: "And I direct them to collect the rents and dividends and after paying all charges and expenses and deducting 5 per cent. of the rents for their trouble to divide the net proceeds into seven equal parts and to pay quarterly two-thirds of one

seventh part to my son Samuel Coulden until he shall become bankrupt . . . . and after the determination by any means of the interest of my said son in such annuity Upon trust to apply the said annuity to the maintenance of his daughter Anne Elizabeth, the remaining one-third of one seventh part to be paid to my granddaughter Anne Elizabeth Coulden, or at the discretion of my said sons John Coulden and George Coulden to whomsoever may have the care of her until she is twenty-one years of age when the amount may be paid to herself to be enjoyed for her own use absolutely and free from the debts control or interference of any husband she may marry. And to pay one seventh part to my son Henry Coulden until he shall become bankrupt . . . . and after the determination by any means of the interest of my said son in such annuity Upon trust to apply the said annuity to the maintenance of the wife and children of my said son. And to pay one seventh part to my daughter Elizabeth Coulden absolutely for her own use and benefit free from the debts control and engagements of any husband she may marry and to pay one seventh part to my daughter Susannah Barrett for her sole use and benefit. And to pay one seventh part to my daughter Edith Coulden for her sole use and benefit absolutely free from the debts control or interference of any husband she may marry. And to pay one seventh part to each of my said sons John Coulden and George Coulden. And on the death of either of my said executors I direct the survivor to sell the whole of my real and personal estate and cause the same to be equally divided amongst my then surviving children and their respective issue. And I appoint my said sons John Coulden and George Coulden executors and trustees of this my will."

The two executors proved the will on March 20, 1884.

The testator had only the seven children named in his will.

John, the executor, died on February 17, 1907.

Susannah married William Barrett, and died before John, leaving three children surviving, namely, William John Barrett, Florence Emily Barrett, and Charles Walter Barrett.

Samuel also died before John, leaving Anne Elizabeth Brown his only issue surviving.

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George was still living.

Henry was also still alive, and his issue were Henry John Coulden, Herbert Coulden, Ernest Arthur Coulden, and Edgar Charles Coulden (an infant).

Elizabeth married one Medrington, and was still living, but had no issue.

Edith married Max Phiefer, and was still alive, the issue of the marriage being two daughters, Gretch Phiefer and Muriel Olive Phiefer.

An originating summons was taken out by Henry Coulden for the determination of the questions who became entitled to the testator's property on the death of John Coulden, and in what shares and proportions. The case was argued before Parker J. on December 5, 1907.

Andrewes-Uthwatt, for the plaintiff.

Romer, K.C., and *Beebee*, for George Coulden. The property is divisible among the children of the testator who survived the deceased executor John Coulden. Under a gift of personalty to A. and his issue the word "issue" is read as a word of limitation, and A. takes an absolute interest: *Butter* v. *Ommaney* (1); *Samuel* v. *Samuel* (2); *Parkin* v. *Knight*. (3)

Buckmaster, K.C., and *Earle*, for William John Barrett, Florence Emily Barrett, Charles Walter Barrett, Anne Elizabeth Brown (all children of deceased children of the testator), and Elizabeth Medrington and Edith Phiefer (surviving daughters of the testator). The gift should be construed by reading "and" as meaning "or," and treating it as a substitutional gift, in respect of the shares of children who predeceased the period of distribution, to the issue of those children who survived that period. Those who take are the surviving children of the testator and the surviving issue of his deceased children, the latter taking their parent's shares.

George Jones (*Harry Dobb* with him), for Henry John Coulden, Herbert Coulden, E. A. Coulden, and E. C. Coulden (children of Henry Coulden, a surviving son of the testator). Only children

(1) (1827) 4 Russ. 70. (2) (1845) 9 Jur. 222.
(3) (1846) 15 Sim. 83.

of the testator who survived the period of distribution, and the surviving children of their children, can take, and the issue of children who predeceased that period are excluded.

There is no doubt as to the grammatical meaning of the clause in question, and that meaning, unless it leads to absurdity or some repugnancy or inconsistency, and not the intention of the testator, must be considered: *Grey* v. *Pearson* (1); *Wing* v. *Angrave*. (2) Issue of children must be alive at the period of distribution in order to take: *Clay* v. *Pennington* (3); and those issue and their surviving parents take equally as purchasers: *Law* v. *Thorp* (4); *Cancellor* v. *Cancellor* (5); *Blackler* v. *Webb*. (6)

[PARKER J. referred to Theobald on Wills, 6th ed. p. 294.]

Romer, K.C., in reply.

Cur. adv. vult.

Dec. 19. PARKER J. The testator in this case had seven children, two of whom he appointed executors and trustees of his will. The scheme of his will is reasonably clear. He fixes the death of that one of the executors and trustees who predeceases the other as the period of distribution. Until the period of distribution the income of the estate is divided into seven parts, and one seventh part is given to or upon trusts in favour of each of the seven children, or in some cases their families. At the period of distribution the whole estate is to be sold and realized and the proceeds divided. No difficulty arises as to the manner in which the income is disposed of prior to the period of distribution. The question is as to the persons among whom the proceeds of the corpus of the estate are divisible at the period of distribution. The clause on which this question depends, though short, is exceedingly obscure. It is as follows: "And on the death of either of my said executors I direct the survivor to sell the whole of my real and personal estate and cause the same to be equally divided amongst my then surviving children and their respective issue."

It is, I think, reasonably clear that "then surviving" means

(1) (1857) 6 H. L. C. 61, 106.
(2) (1860) 8 H. L. C. 183, 215.
(3) (1835) 7 Sim. 370.
(4) (1858) 4 Jur. (N.S.) 447.
(5) (1862) 2 Dr. & Sm. 194.
(6) (1726) 2 P. Wms. 383.

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surviving at the period of distribution, and if the division directed had been a division amongst the testator's then surviving children, without more, those children only who survived the period of distribution must have taken by force of the words used, however capricious such an intention on the testator's part might have seemed to the Court. The same result must follow if, according to the true construction of the will, the words "and their respective issue" are used as words of limitation defining the estate to be taken by the then surviving children. The first point, therefore, which arises for decision is whether the words "and their respective issue" are words of limitation.

In gifts of real estate the word "issue," in a gift to A. and his issue, is, according to the decisions, prima facie a word of limitation creating an estate tail. The reason is that an estate tail in the ancestor is the only way of providing for all the issue of the ancestor, and the Courts have assumed that in a devise to one and his issue the whole line of issue is intended. There is no similar reason for holding that "issue" is prima facie a word of limitation in gifts of personal property. On the contrary, to hold "issue" in such a case to be a word of limitation would, by conferring an absolute interest on the ancestor, deprive the issue of all benefit under the will. Therefore I do not think that there is any rule of construction compelling me to hold that in gifts of personalty "issue" is prima facie a word of limitation. That the word "issue" may in gifts of personal property be a word of limitation no one doubts, but, in my judgment, whether it be so or not is purely a question of construction on each particular instrument, the Court which has to interpret such instrument being unfettered by any general rule. Indeed, by a gift of personalty to A. and his issue, it seems to me more likely that a testator means the issue to take jointly with or by substitution for A. than that A. should take to the exclusion of his issue, and where there are words of division, such as a gift to divide between A. and his issue, it is, in my judgment, almost conclusive that the word "issue" cannot be used as a word of limitation.

In the present case I have come to the conclusion that on the true construction of the will the word "issue" is not used as a

word of limitation, but that the issue referred to are members of the class between whom the division is to be made at the period of distribution.

The next question is, Who are the issue referred to? Are they issue only of such children as survive the period of distribution, or do they include the issue of children who predecease that period? I have come to the conclusion that the testator did not contemplate that any member of the class in whose favour the estate is given could take unless he or she survived the period of distribution. In other words, I read the words "then surviving" as qualifying, not only the children, but their respective issue, so that no issue predeceasing the period of distribution are within the class. This being so, I think the gift may be read as a gift to the testator's children and their respective issue surviving at the period of distribution, and that the issue then surviving of a child who predeceases that period are within the gift. A similar construction was placed on somewhat analogous words in *In re Fox's Will.* (1)

Lastly, do the children and issue of children surviving at the period of distribution take per capita, the issue competing with their parents, or can I read the words "and their respective issue" as an alternative gift to the issue only of children who predecease the period of distribution? It should be noticed that, if the words can be read as an alternative gift, such gift will be an original and not a substitutional gift, for no child can take unless he or she survives the period of distribution. There would appear to be no great difficulty in reading such words as "and their issue" or "and their respective issue" as an alternative and substitutional gift. This was done in *In re Stanhope's Trusts* (2), *Pearson* v. *Stephen* (3), *Gibbs* v. *Tait* (4), *Dick* v. *Lacy* (5), and possibly in *Butter* v. *Ommaney* (6), such a construction being in some of those cases assisted by indications that the testator intended the issue to take by stirpital distribution. I can find no case in which similar words have been construed as an

(1) (1865) 35 Beav. 163.
(2) (1859) 27 Beav. 201.
(3) (1831) 2 Dow & Cl. 328; 5 Bli. (N.S.) 203.
(4) (1836) 8 Sim. 132.
(5) (1845) 8 Beav. 214.
(6) 4 Russ. 70.

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alternative and original gift. But, after the best consideration I can give the matter, I do not think that there is more difficulty in construing the words in question as an alternative and original gift than there would be in construing them as an alternative and substitutional gift, when such a construction is possible. And in the present case the use of the word " respective " appears to me to point to a stirpital distribution: see the remarks of Page Wood V.-C. in *In re Hodgson's Trust* (1) and of Byrne J. in *In re Coley* (2), and the case of *Davis* v. *Bennett.* (3)

Where all is so obscure it is impossible to decide with any confidence, but I think that I shall be giving effect to the intentions of the testator, as disclosed by his will, by holding, and I accordingly hold, that the gift to the issue is alternative though original, and that the issue of children living at the period of distribution do not take concurrently with such children. The result is that the estate is, in my judgment, divisible into as many shares as there were children who survived the period of distribution or predeceased that period leaving issue who so survived, and that such surviving issue in each case take the share which the child so dying would have taken had he or she survived the period of distribution.

Solicitors: *Jennens & Jennens; Hogan & Hughes; Francis & Calley.*

(1) (1854) 1 K. & J. 178, 181. (2) [1901] 1 Ch. 40, 43.
(3) (1862) 4 D. F. & J. 327.

F. E.

ATTORNEY-GENERAL *v.* METCALF & GREIG.

C. A. 1907 Nov. 6.

[1904 A. 231.]

London—Building not of uniform Height—"Height"—"Front or nearest external Wall"—Width of Street—Method of Measurement—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 5, *sub-ss.* 15, 21; *s.* 49.

In determining whether a building which is not of uniform height contravenes the provisions contained in s. 49 of the London Building Act, 1894, regulating the height of buildings, it is a question of fact in each case whether the building under consideration should be treated as a whole, or whether it may be regarded as several distinct buildings, the height of which may be measured according to different standards.

The question what constitutes "the front or nearest external wall" of a building within the section is also a question of fact to be dealt with in each case.

Where a portion of a building is set back from the general line of frontage it does not necessarily follow that that portion must be treated as a separate building entitled to have its height measured according to a different standard from that applied to the building regarded as a whole.

It is not possible, without contravening the provisions of s. 49, to erect a building in steps or terraces with a series of front walls running up one behind the other to a height exceeding that which is permissible for the front wall of that portion of the building which abuts upon the street.

Decision of Kekewich J., [1907] 2 Ch. 23, reversed.

Appeal from Kekewich J. (1)

The question for decision raised by this appeal was under what circumstances it is not permissible, having regard to the provisions of the London Building Act, 1894, to erect on the side of a new street less than fifty feet in width a building which exceeds in height the width of the street.

The action was originally brought by the Attorney-General at the relation of Henry Gibbon, since deceased, and was continued by E. R. Gibbon and C. M. Moore, his legal personal representatives, for an injunction to restrain the defendants from erecting any building on the west side of Salem Road, Paddington, so that

(1) [1907] 2 Ch. 23.

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the height of its external walls would exceed the distance of the nearest external wall of the said building from the opposite side of Salem Road, contrary to the provisions of the said Act; and also for a mandatory order upon the defendants to pull down so much of a certain building, a block of flats, as had been erected contrary to the provisions of the said Act.

The building in question was erected upon a corner site, fronting partly upon Moscow Road, an old street, fifty-two feet in width, and partly upon Salem Road, which was held in the action to be a new street, forty feet in width. The height of the building facing Moscow Road, and for a return of forty feet along Salem Road, did not exceed the height allowed by the Act. For the remainder of its frontage upon Salem Road, however, a portion of the block was set back about twenty feet, and the front external wall of this portion was about sixty feet high. The rest of the building fronting upon Salem Road was brought forward to the line of the pavement, the height of the front external wall being forty feet to the base of a gable, which contained two storeys and rose to an extra height of twenty feet. Behind this projecting portion the building was carried up several storeys higher still. The plaintiffs alleged that in the construction of the building the provisions of the Act (1) had

(1) The London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), provides:—

Sect. 5: "In this Act unless the context otherwise requires— . . . ."

"(21.) The expression 'height' in relation to any building means the measurement taken from the level of the footway (if any) immediately in front of the centre of the face of the building or (where there is no such footway) from the level of the ground before excavation to the level of the top of the parapet or where there is no parapet to the level of the top of the external wall or (in the case of gabled buildings) to the base of the gable."

Sect. 49: "After the commencement of this Act no existing building (other than a church or chapel) on the side of a street formed or laid out after the seventh day of August 1862 and of a less width than fifty feet shall without the consent of the council be raised and no new building shall without the consent of the council be erected on the side of any such street so that the height of such building shall exceed the distance of the front or nearest external wall of such building from the opposite side of such street.

"Where such building is erected or intended to be erected on a corner plot so as to abut upon more than one street the height of the building shall (unless the council otherwise

been contravened, and they asked for an injunction as above stated.

The fee simple in the property was vested in the defendants, the Law Debenture Corporation, Limited, as trustees for debenture-holders of William Whiteley, Limited.

The defendants Metcalf & Greig had erected the block of flats under a building agreement with William Whiteley, Limited, by which they were entitled, upon completion of the building, to a lease for ninety years from March 25, 1902.

By an indenture, dated March 31, 1903, the defendants Metcalf & Greig mortgaged the premises comprised in the building agreement to William Whiteley as trustee for William Whiteley, Limited, and by another indenture dated October 30, 1903, they effected a second mortgage upon the property in favour of the defendant Bond.

The external walls of the building were practically completed before the issue of the writ on February 11, 1904.

The block of flats had been erected with the consent of the Paddington Borough Council, and without any objection from the London County Council or the district surveyor, but the consent of the London County Council to the erection of the building had not been obtained.

On December 16, 1904, the defendant Bond entered into possession of the block of flats, which at that time had been completely erected.

Kekewich J. held that, in determining whether the building contravened the provisions of the Act, it must not be regarded as a whole, but each part alleged to offend against the Act must be treated and examined as if it were a separate building; and, further, that there was nothing in s. 49 to prohibit the erection of a building such as that now in question, having a portion abutting on the street within the prescribed height, and having behind that another raised portion whose height did not exceed the distance of the front or nearest external wall of such portion from the

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consent) be regulated by the wider of such streets so far as it abuts or will abut upon such wider street and also so far as it abuts or will abut upon the narrower of such streets to a distance of forty feet from the wider street. . . . ."

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opposite side of the street. In other words, there was nothing in the section to prohibit the erection of a building in steps, each step having its own front wall and being entitled to have its height measured according to a different standard.

From this decision the plaintiffs appealed.

P. O. Lawrence, K.C., *Danckwerts*, K.C., and *R. C. Glen*, for the appellants. The interpretation put upon the Act in the decision appealed from is wrong. The Act contemplates only one front and one nearest external wall. The building must be regarded as a whole.

[They were stopped by the Court.]

Horace Avory, K.C., and *Tomlin*, for the respondents William Whiteley and William Whiteley, Limited. Apart from the construction of the Act, this is not a case in which the Court will make a mandatory order. The plaintiffs have been guilty of unreasonable delay amounting to laches.

[COZENS-HARDY M.R. There cannot be laches on the part of the Attorney-General, who is here representing the public.]

The Attorney-General will be affected by any equity which is in the defendants. The point was left open by Farwell J. in *Attorney-General* v. *Wimbledon House Estate Co.* (1): see also *Kirkheaton Local Board* v. *Ainley, Sons & Co.* (2) The Court will take into consideration that the persons whose duty it is to construe and administer this Act have not taken any action against the defendants.

Upon the question of construction, it is said that "the front or nearest external wall" of a building means the wall of that portion which happens to be nearest to the opposite side of the street. We submit that it means the external wall of that portion of the building the height of which is being considered. Kekewich J. has construed the section in accordance with the object of the Act. In order to ascertain the "nearest external wall" you must draw a line from the opposite side of the street, and where that line strikes the building under consideration that gives a point upon the "nearest external wall." In some cases it is impossible to treat the building as a whole. For instance,

(1) [1904] 2 Ch. 34. (2) [1892] 2 Q. B. 274.

where the street is of varying width, each portion of a building fronting upon it must be separately considered. In s. 49 the words "building" and "new building" cannot properly be construed to mean the whole building.

Edward Ford, for the defendants Metcalf & Greig.

Martelli, for the defendants the Law Debenture Corporation.

Stewart-Smith, K.C., and *W. E. Vernon*, for the defendant Bond.

COZENS-HARDY M.R. This appeal raises a question of the construction of the London Building Act, 1894, s. 49. The question really is under what circumstances it is not permissible to erect on the side of a new street a building which exceeds the width of the street. I am only speaking in general language here, because it is necessary to consider more in detail the particular language used. The section is this: "After the commencement of this Act no existing building (other than a church or chapel) on the side of a street formed or laid out after the seventh day of August 1862 and of a less width than fifty feet shall without the consent of the council be raised and no new building shall without the consent of the council be erected on the side of any such street so that the height of such building shall exceed the distance of the front or nearest external wall of such building from the opposite side of such street." Then there is another portion of that section which contemplates a building which may be erected in an adjacent street where the height would be different. That goes on to say: "Where such building is erected or intended to be erected on a corner plot so as to abut upon more than one street the height of the building shall (unless the council otherwise consent) be regulated by the wider of such streets so far as it abuts or will abut upon such wider street and also so far as it abuts or will abut upon the narrower of such streets to a distance of forty feet from the wider street. . . . ."

Now, pausing there, it seems to me plain that, thus far, what constitutes one building, or a building as distinguished from several buildings, is a question of fact in each case. In the present instance it cannot be disputed, I think, and it is not questioned, that this is really one building, and not several distinct buildings. Then the Act provides that the height of such

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building shall not exceed the distance of the front or nearest external wall of such building from the opposite side of such street. What does that mean? You may have a building which has no front at all to the street. It may be some back wall or a side wall. In that case you measure from the external wall; in the other case you measure from the front wall, if there is a front wall to the street. Then, again, what is the front wall of a building next the street? That seems to me also to be a question of fact to be dealt with in each case. I can quite conceive that there may be a building so constructed that the front of the building may reasonably be said to vary. On the other hand, I am quite clear in my own mind that the mere fact that there is a recess going back from what I may call the general line of frontage does not in any way vary the meaning of "the front wall of such building" as used in this section.

Now the contention between the parties is this. The building in Moscow Road may go to eighty feet high. It is quite obvious it would be useless to say that a man may build in Moscow Road eighty feet high, unless the building may also extend some distance in Salem Road, because otherwise you would be only able to have a back wall. So the Legislature says that for a distance of forty feet in Salem Road you may continue that height; in fact, for forty feet it is treated as an ordinary part of Moscow Road. Then comes the question of what is really and truly to be regarded as the front wall in Salem Road. I cannot think myself that it can be doubted what is the front wall, and, with the very greatest possible respect to the learned judge, I am entirely unable to assent to his view that the meaning of this section is that you may have any number of front walls running up one behind the other, and that you can, without contravening this section, erect a building in steps or terraces. I do not think that this is the true meaning of the statute, and it follows that we ought to make a declaration to that effect, and, with the greatest possible respect, differ from the learned judge.

But I think that this is a case in which an opportunity ought to be given to apply to the county council for their consent, it being clearly understood that that permission is in no way to be taken as an indication of our view as to what the

county council, in the exercise of their full discretion, may think fit to do. All we mean by it is that the present respondents should have an opportunity afforded them of making such case as they can, leaving the county council to do what they have never yet done, namely, consider whether the circumstances are such that they ought to exercise their discretion.

FLETCHER MOULTON L.J. I am of the same opinion, for the same reasons. I will only add this, that arguments on a section of this kind, pointing out difficulties that may arise in a special building whose structure is peculiar, have very little effect upon my mind, for the following reason. I do not think that in a section like this the Legislature attempts to anticipate all the varieties of shape that buildings can take, or to perform the impossible task of framing language which will equally suit all. I think it takes the ordinary type of buildings, and selects language suitable for that type. That language, properly construed, may lead in some cases to hardship in the case of buildings that are of a peculiar character, but the Legislature has given to the body into whose hands it entrusts the working of this Act the power of relaxing the severity of the rule in any individual case where it may think proper. Under those circumstances, the fact that you can conceive a building which would, on the interpretation which the Court is putting on the section, be subjected to great hardship and very onerous restrictions affords no argument against the construction which we propose to put on the section; because such a building would be a case in which the London County Council would relieve.

My remarks are perfectly general, and it must not be understood that they in any way indicate that I think that this is or is not a case in which the rule ought to be relaxed; for the truth is I have neither the material, nor am I competent, to decide whether the London County Council ought to interfere.

FARWELL L.J. I agree, and have nothing to add.

COZENS-HARDY M.R. Upon the question of construction the appellants are entitled to succeed, but no order will be drawn up

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at present; the appeal must stand over with liberty to apply. When the case comes on again, of course we will hear further argument upon the other points.

Solicitors: *Gibbon & Moore; Roche, Son & Neale; Clinton & Co., for J. Pierce, Nottingham; Bircham & Co.*

G. A. S.

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Jan. 20.

In re DISCOVERERS FINANCE CORPORATION, LIMITED.

[00199 of 1906.]

Company—Winding-up—Contributory—Transfer of Shares to escape Liability—Validity—Test—Out-and-out Transfer—Bona fides—Equities between Transferor and Transferee.

THIS was an appeal from the decision of Parker J. (1)

On the case being called, counsel informed the Court that a settlement had been arrived at, subject to the approval of the judge in the winding-up, under which the appeal was to be dismissed with costs.

H. Terrell, K.C., and *E. Clayton*, for the appellant.
Younger, K.C., and *John Galloway*, for the respondent.

Solicitors: *Charles Dunderdale; Rising & Ravenscroft.*

(1) Ante, p. 141.

W. C. D.

NATIONAL PHONOGRAPH COMPANY, LIMITED *v.* EDISON-BELL CONSOLIDATED PHONOGRAPH COMPANY, LIMITED.

[1904 N. 1778.]

C. A.
1906
JOYCE J.
Oct. 26, 27, 29; *Dec.* 15.
1907
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Nov. 25, 26; *Dec.* 18.

Action, Cause of—Special Goods—Conditions of Sale—Wholesale and Retail Dealers' Agreements—Fixed Prices—Proscribed Dealers—Inducing Dealers to commit Breach of Agreement—Fraud—Interference with contractual Relation—Violation of legal Right—Damage.

The plaintiffs, who were manufacturers, sold their goods wholesale to factors upon the terms of an agreement which provided that factors should only sell the plaintiffs' goods to dealers who had signed a retailer's agreement in a form provided by the plaintiffs. Both the factor's agreement and the retailer's agreement provided that the plaintiffs' goods should not be sold at less than the specified current list prices applicable respectively to factors and retailers, or to dealers on the plaintiffs' suspended list. The defendant company, who dealt in goods of the kind manufactured by the plaintiffs, and who had been placed on the plaintiffs' suspended list, obtained the plaintiffs' goods from a dealer, who had signed the retailer's agreement, at less than the prescribed retail price. The defendant company also employed H. and L., other defendants, to obtain the plaintiffs' goods from certain factors, who had signed the plaintiffs' factor's agreement, by falsely representing themselves as independent dealers and dealing in fictitious names. The defendant company paid the prescribed price to the factors through H. and L. and in their assumed names. In consequence of the defendant company having obtained the plaintiffs' goods the plaintiffs suffered damage in their business. In respect of both transactions the plaintiffs claimed against the defendant company for an injunction and damages:—

Held (affirming the decision of Joyce J.), that the transaction between the defendant company and the retail dealer did not give the plaintiffs any cause of action against the defendant company; but

Held (reversing the decision of Joyce J.), that the plaintiffs were entitled to an injunction and damages in respect of the transactions between the defendant company and the factors on the ground that the defendant company, in having by fraud induced the factors to sell to them the plaintiffs' goods contrary to the duty owed by the factors to the plaintiffs, had interfered without justification with the contractual relations existing between the plaintiffs and the factors, thereby causing damage to the plaintiffs.

The law as laid down by Lord Watson in *Allen* v. *Flood*, [1898] A. C. 1, 96, and by Lord Macnaghten in *Quinn* v. *Leathem*, [1901] A. C. 495, 510, applied.

WITNESS ACTION.

The plaintiffs were dealers in Edison phonographs, records,

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and blanks, and in order to secure uniformity of prices and to prevent their business from being injured by any dealers cutting prices, sold their goods only upon the terms of certain printed documents described, as "Factor's price list, terms, discounts, and conditions of sale, and agreement," and "Retail dealer's price list, terms, discounts and conditions of sale, and agreement," applicable to the wholesale and retail trades respectively. Both documents stated that all Edison phonographs, records, and blanks were sold at London, England, subject to the conditions therein set out.

There were thirteen conditions of sale attached to the factor's agreement, most of them relating to discount rates, price lists, and the goods in question, but the following are alone material for the purposes of this report:—

"No. 2. Factors must not give away or sell or offer for sale at retail, either directly or indirectly, Edison phonographs, records or blanks at less than current list prices, nor include with a machine at current list price, any extra material or supplies not listed to go with same as a regular outfit."

"No. 4. Factors must not sell or supply or place on consignment, either directly or indirectly, Edison phonographs, or parts thereof, records or blanks to any dealer who has not signed the agreement, required by the National Phonograph Company, Limited, governing and controlling the sale of same, nor to dealers who are on our suspended list."

"No. 8. Factors must forward immediately to the National Phonograph Company, Limited, the required agreement, properly dated and signed, before a witness, by all dealers established by them."

"No. 10. Factors violating any of the above conditions, or failing to pay accounts due to the National Phonograph Company, Limited, may be at once cut off from any further supply of goods and placed on the suspended list."

There were ten conditions of sale attached to the retail dealer's agreement, of which the following only are material:—

"No. 1. Retail dealers must not give away or sell or offer for sale, either directly or indirectly, Edison phonographs, records or blanks at a discount, or at less than current list prices, nor to

dealers who are on our suspended list, nor include with a machine at list price any extra material or supplies not listed to go with same as a regular outfit.

"No. 2. Giving away or selling other goods at less than current prices, in order to induce the sale of Edison phonographs or records, will be a violation of the conditions hereof."

"No. 4. Exchanging Edison phonographs, records or blanks in whole or part payment for advertising privileges, or for goods of some other make or nature; or the acceptance of goods or merchandise of other make or nature in whole or part payment for Edison phonographs, records or blanks, is contrary to the conditions hereof. . . . ."

"No. 7. Dealers violating any of the above conditions, or failing to pay accounts due to the National Phonograph Company, Limited, may be at once cut off from any further supply of goods and placed on the suspended list."

Appended to these conditions of sale was the following form:—

"Retail Dealer's Agreement.

"In consideration of the sale of Edison phonographs, records and blanks to $\frac{\text{me}}{\text{us}}$ at current retail dealers' discounts by and after carefully reading the above price list, terms, discounts and conditions of sale, $\frac{\text{I}}{\text{we}}$ hereby agree with the National Phonograph Company, Limited, to conform with, and adhere strictly to, and be bound by, the same.

Dated 190 Signed
Witness Business
Street and No.
City "

The defendants were also dealers in phonographic goods, and had been put by the plaintiffs upon their suspended list. There was no allegation or suggestion that the defendants had been guilty of any act or default in violation of any conditions of sale, but, for trade reasons, the plaintiffs desired to prevent the defendants from obtaining as dealers the plaintiffs' goods.

Simpson & Co. were factors of the plaintiffs, and had signed the factor's agreement.

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In 1903 one Ell, a dealer in phonographic materials, under the style of the Great Eastern Rubber Company, at 156, Bishopsgate Street Without, became a customer of Simpson & Co. for the purpose of obtaining through them the plaintiffs' goods. Before doing business with him Simpson & Co. required him to sign the retail dealer's agreement, which he accordingly did. Simpson & Co. did not fill up the blank space in the agreement left for the insertion of the factor's name. Ell was also a customer of the defendant company, and had purchased goods from them. In 1904 Ell, as the result of an interview with one Presland, an employee of the defendant company, obtained twenty-seven of the plaintiffs' phonographs from Simpson & Co., and supplied them through Presland to the defendant company. Ell paid to Simpson & Co. the prescribed factor's price for the machines with money paid to him by the defendant company, making no profit himself out of the transaction. Ell did not know that the defendant company was on the plaintiffs' suspended list.

There was also an allegation of fraudulent conspiracy to obtain the plaintiffs' goods, but this was struck out by amendment as stated below.

The evidence shewed that in 1904 the defendants Leach and Hughes, acting on behalf of and with the authority of the defendant company, assumed fictitious names, and, representing falsely that they were independent dealers in phonographic goods, applied to wholesale dealers who had entered into factors' agreements with the plaintiffs, and, having signed retailers' agreements in fictitious names, obtained from the wholesale dealers a large number of the plaintiffs' machines with the usual trade discounts. These machines were in fact, though not to the knowledge of the wholesale dealers, obtained for and were handed over to the defendant company.

It appeared from the evidence that the defendant company sold phonograph records, which fitted the plaintiffs' machines, at a cheaper rate than the records sold by the plaintiffs, and that records were a better paying product than the machines themselves. It was stated that the defendant company had obtained about 700 of the plaintiffs' machines. The plaintiffs alleged

that the acts of the defendant company of which they complained had caused them great injury in their business. No direct pecuniary loss was proved, but a general falling off of business was shewn, which, it was said, was due to the fact that the sale of the plaintiffs' machines by the defendant company caused a demand for the records of the defendant company rather than for those of the plaintiffs, whereas if the plaintiffs' machines could only be obtained by the public from retailers who had signed the plaintiffs' retailer's agreement, the retailers would have obtained from the factors, and the public from the retailers, the plaintiffs' records; it was also said that persons going to the defendant company's place of business to purchase the plaintiffs' machines might ultimately be induced to purchase the defendant company's machines instead of the plaintiffs'; and it was further said that the plaintiffs' business would be injured by the acts of the defendant company, because if retailers saw that the plaintiffs' machines were being sold by the defendant company, and knew that the defendant company were on the suspended list, the retailers would think that the plaintiffs were incapable of maintaining their agreements, and would consequently cease to stock the plaintiffs' goods.

The plaintiffs commenced this action for—(1.) an injunction restraining the defendant company and the defendant Hough from inciting or procuring the defendant Leach or the defendant Hughes or other persons to enter under false names into agreements with the plaintiff company for the purchase of their goods with trade discounts, or from otherwise inciting or procuring the said or other servants of the defendant company to obtain the goods of the plaintiff company at trade discount rates for the benefit of the defendant company; (2.) an injunction restraining the defendant company and the defendants Hough, Leach, and Hughes from conspiring together to obtain at discount rates the goods of the plaintiff company for the benefit of the defendant company; (3.) an injunction restraining the defendant company, their servants and agents, and the defendant Hough from procuring or inciting any persons or firms who have entered into factors' or retail dealers' agreements with the

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plaintiff company to sell to the defendant company the goods of the plaintiff company to the damage of the plaintiff company in breach of the terms of the said agreements, or from otherwise committing breaches of the said agreements; and (4.) damages.

At the trial the plaintiffs amended their statement of claim by striking out all the allegations of conspiracy, and the claim for an injunction secondly above set out.

The action came on for hearing before Joyce J. on October 26, 1906.

Cripps, K.C., *Walter, K.C.*, and *Compston*, for the plaintiffs. The plaintiffs have two grounds of complaint against the defendants. First, the defendants improperly induced Ell to break his agreement with the plaintiffs in violation of their contractual right and to their detriment, both because he sold to dealers who were on the suspended list, and because he re-sold at trade discount rates. Secondly, the defendants, acting through a dummy, who used a fictitious name, induced and procured the wholesale dealer to break his contract with the plaintiffs by inducing him to supply goods to a firm whose name was on the prohibited list. In other words, by means of a trick they induced the wholesale dealer to commit a breach of the contractual arrangement which existed between him and the plaintiffs. If, however, the dummy be regarded as a retail dealer, then the defendants caused him to break his agreement by selling at trade discount rates to a firm which was on the prohibited list.

The nature of the actionable wrong of which the plaintiffs complain is the inducing or procuring, without just cause or excuse, third parties, either the wholesale or retail dealers, to act in violation of a contractual right which they had undertaken towards the plaintiffs. A long series of decisions has led up to the present state of the law on this question, beginning with *Lumley* v. *Gye* (1), and including *Bowen* v. *Hall* (2), *Temperton* v. *Russell* (3), *Quinn* v. *Leathem* (4), and *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (5) It is clearly put by Lord

(1) (1853) 2 E. & B. 216.
(2) (1881) 6 Q. B. D. 333.
(3) [1893] 1 Q. B. 715, 728.
(4) [1901] A. C. 495, 510.
(5) [1905] A. C. 239.

Macnaghten in *Quinn* v. *Leathem* (1), where, speaking of *Lumley* v. *Gye* (2), he says: "Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference." The more recent of those cases shew distinctly that evidence of malice, in the sense of spite, is not necessary in an action of this sort.

The plaintiffs can elect to sue either the man who breaks the contract with them, or, on the principle stated in *Quinn* v. *Leathem* (1), the man who induces him to break it.

On the question whether it is necessary to prove damage, we submit that, even apart from damage or detriment to the plaintiffs, the inducing a third party to commit a breach of contractual undertaking is an actionable wrong; and there are passages from Lord Lindley's speeches in *Quinn* v. *Leathem* (1) and *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (3), and from Lord Watson's speech in *Allen* v. *Flood* (4), which support that view. But we are not compelled to put our case so high as that, because, if proof of damage be necessary, there has been undoubted damage to the plaintiffs as traders in carrying on their business from the acts of the defendants. Evidence of a general loss of business is admissible and sufficient: *Evans* v. *Harries* (5); *Ratcliffe* v. *Evans*. (6) The principle of those cases was approved in *Riding* v. *Smith*. (7)

Hughes, K.C., and *J. G. Wood*, for the defendants. The proposition advanced by the plaintiffs is that if B. has agreed with A. not to sell to C., C. can be restrained from buying from B. Conditions of such a nature as these cannot be attached on a sale of goods: *Taddy & Co.* v. *Sterious & Co.* (8), approved in *McGruther* v. *Pitcher*. (9) This is a stronger case than *Taddy*

(1) [1901] A. C. 495, 510.
(2) 2 E. & B. 216.
(3) [1905] A. C. 239.
(4) [1898] A. C. 1.
(5) (1856) 26 L. J. (Ex.) 31.
(6) [1892] 2 Q. B. 524.
(7) (1876) 1 Ex. D. 91.
(8) [1904] 1 Ch. 354.
(9) [1904] 2 Ch. 306.

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& Co. v. *Sterious & Co.* (1), for in that case the plaintiffs were held entitled to restrain the retailer from selling, but here it is sought to restrain the public, of whom the defendant company is one, from buying.

[JOYCE J. This is a case of tort; there is no contract here.]

That is so, but we submit that it is not a tort for the defendants to buy from a tradesman when they know that he is under agreement not to sell to them. The retail dealer's agreement is invalid as being in restraint of trade.

Neither *Quinn* v. *Leathem* (2) nor *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (3) has anything to do with this case. In the former there was a conspiracy deliberately to injure, and in the latter case the miners were induced to break their contract in order to coerce the masters, and there necessarily was loss to the masters.

With regard to the complaint that the defendants obtained goods by using fictitious names, it is not wrongful or a tort to buy goods under an alias. The only result is that the seller's malicious intent to boycott is frustrated.

The damages which the plaintiffs suggest they have suffered are too remote. They have obtained the full price for their goods.

Cripps, K.C., in reply. *McGruther* v. *Pitcher* (4) is not applicable. It was a case of contract, and this is a case of tort. Prima facie there could not be better evidence of damage than that given by the director of the plaintiff company. It has not been contradicted, and the defendants have not produced any evidence against it.

Cur. adv. vult.

1906. Dec. 15. JOYCE J. The plaintiffs in this case are dealers in phonographs and phonographic materials, and the action is, first, for an injunction to restrain the defendant company from procuring persons to enter under false names into agreements with the plaintiff company for the purchase of their goods, with trade discounts, or from otherwise procuring the servants of the

(1) [1904] 1 Ch. 354.
(2) [1901] A. C. 495.
(3) [1905] A. C. 239.
(4) [1904] 2 Ch. 306.

defendant company to obtain the goods of the plaintiff company at trade discount rates for the benefit of the defendant company. I have omitted the words "from inciting," partly because I think it was not insisted upon ultimately by the plaintiffs' counsel, and because in cases of this kind inciting is clearly not actionable when no damage results, unless the act be committed which the person is incited to do. So, also, I omit the last part of this claim, the general claim to an injunction to restrain the defendant company from procuring their servants to obtain goods of the plaintiffs at trade discount rates, because that taken generally is to my mind not actionable.

Then the second claim is for an injunction to restrain the defendant company from inciting persons who have entered into factors' or retail dealers' agreements with the plaintiff company to sell to the defendant company the goods of the plaintiffs to the damage of the plaintiff company, and in breach of the terms of the said agreements; and there is a general claim for damages, which, I suppose, is intended to extend to both the claims for an injunction.

It will be more convenient, I think, to deal first with the second claim. This arises out of a transaction which occurred two years ago. The parties to it were one Presland, who is employed by the defendant company, and a Mr. Ell, who, under the style of the Great Eastern Rubber Company, deals in phonographic materials at 156, Bishopsgate Street Without, and who had in January, 1903, put his name to what the plaintiffs call their retail dealer's agreement. That agreement, which is appended to a printed document intituled "Retail dealer's price list, terms, discounts and conditions of sale," is itself a printed form with a blank to be filled up in writing. Of the conditions of sale referred to I will read No. 1, "Retail dealers must not give away or sell or offer for sale, either directly or indirectly, Edison phonographs, records or blanks at a discount, or at less than current list prices, nor to dealers who are on our suspended list, nor include with a machine at list price any extra material or supplies not listed to go with same as a regular outfit." Then No. 2 reads, "Giving away or selling other goods at less than current prices, in order to induce the sale of Edison phonographs or

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records, will be a violation of the conditions hereof." Then part of No. 4 is, "Exchanging Edison phonographs, records or blanks in whole or part payment for advertising privileges, or for goods of some other make or nature; or the acceptance of goods or merchandise of other make or nature in whole or part payment for Edison phonographs, records or blanks, is contrary to the conditions hereof."

Now No. 1, which I have just read, mentions "our" (that is, the plaintiffs') suspended list, a not very appropriate term in the sense in which it is used, nor is it intelligible without the explanation in condition No. 7, which is as follows: "Dealers violating any of the above conditions, or failing to pay accounts due to the National Phonograph Company, Limited, may be at once cut off from any further supply of goods and placed on the suspended list." It is not alleged or suggested that the defendant company have been guilty of any such act or default as referred to in condition No. 7. But the plaintiffs, who dislike them for some reason or other which does not appear, have in fact placed the name of the defendant company on the so-called "suspended list." Upon the true construction of the before-mentioned printed document it seems to me at least doubtful whether as between the parties thereto (whoever they may be) the plaintiffs are entitled arbitrarily, or for any reason not within condition No. 7, thus to proscribe or boycott any person not being such an offender as referred to in this seventh condition, or have any right to complain of a retail dealer, such as Mr. Ell, selling the plaintiffs' goods to a person who has not so offended. But Mr. Ell did sell to Presland—doubtless for his employers, the defendant company—or, to be more accurate, he procured for the defendant company from Simpson & Co., the wholesale dealers, who ordinarily supplied him, certain of the plaintiffs' goods at less than the prescribed retail prices specified in the retail dealer's agreement which had been signed by him. The theory of the plaintiffs is that by so doing Mr. Ell committed a breach of his agreement, and that the defendant company, through Presland, induced and procured him to commit this breach, and that, without suing Mr. Ell at all, the plaintiffs can maintain this action (which is an action of tort) against the

defendant company for damages and an injunction to restrain the defendant company from procuring Mr. Ell or other persons in a similar position who have signed a retail dealer's agreement, to sell goods obtained from the plaintiffs to the defendant company at trade discounts not permitted by the retail dealer's agreement, or which the retail dealer's agreement purports to forbid.

The action is obviously based upon the assumption that Mr. Ell committed a breach of some contract with the plaintiffs for which they could recover damages against him. If this assumption is erroneous, clearly there would be no ground for such an action as this against the defendant company. Further, the damages, if any, recoverable against the defendant company for procuring the breach of contract could not exceed those recoverable against Mr. Ell for the breach itself.

But has Mr. Ell done anything in respect of which the plaintiffs could, if they did sue him, recover even nominal damages for breach of contract? Let us examine the terms of the only contract, if any, by which Mr. Ell is under any obligation to the plaintiffs. Now he never dealt or communicated directly with the plaintiffs at all, but he obtained their goods from Simpson & Co., wholesale dealers. Before doing business with Mr. Ell, Simpson & Co. required him to sign what is called the retail dealer's agreement at the foot of the document, parts of which I have read. What he signed was in these terms, "In consideration of the sale of Edison phonographs, records, and blanks to me at current retail dealer's discounts by and after carefully reading the above price list, terms, discounts, and conditions of sale, I hereby agree with the National Phonograph Company, Limited" (that is, the plaintiffs) "to conform with and adhere strictly to and be bound by the same." That is signed by Mr. Ell. Between Mr. Ell and the plaintiffs there is no contract other than that, if any, which is expressed in this document. What is the legal effect of this document with the blank not filled up? I conjecture that the ingenious person who contrived it intended that upon its being signed by any one the wholesale dealer who procured the signature should fill up the blank with his own name, or, in other words, that in this case the blank

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should have been filled up with the name of Simpson & Co. Suppose it to have been so filled up before it was signed by Mr. Ell, who in point of law would be the parties to the contract such as it is? It was not in fact made with the plaintiffs, though the promise purports to be made to or with them. If, however, the contract in point of law be between the plaintiffs and Mr. Ell, what is the consideration, if any? There is no inconvenience sustained by the plaintiffs nor any act of theirs by which Mr. Ell derived any advantage. There was no detriment to the plaintiffs, nor any benefit to Mr. Ell moving from the plaintiffs. No stranger to the consideration can sue upon a contract though made for his benefit: *Tweddle* v. *Atkinson*. (1) Simpson & Co., from whom, as it seems to me, the consideration, if any, moved, are not plaintiffs nor even parties to these proceedings. Consequently it appears to me, as at present advised, to say the least, to be extremely doubtful whether the present plaintiffs could maintain any action against Mr. Ell or any one else, including the defendant company, founded upon any supposed breach of the so-called retail dealer's agreement, signed by Mr. Ell. At all events, the plaintiffs have not thought fit to sue Mr. Ell. There is no suggestion that he was not worth suing. He appeared as a witness for the plaintiffs. He does business with both parties, and is apparently not unfriendly to either.

The plaintiffs have failed to prove before me that the defendant company or Presland, directly or indirectly, procured or even incited Mr. Ell to violate his contract if he had entered into any with the plaintiffs. Indeed, it has not been proved before me that the defendant company has incited or procured any one to do anything whatsoever. Let it be assumed, however, for the sake of argument, that, when Mr. Ell sold or transferred the goods which he obtained from Simpson & Co. to the defendant company with trade discounts, this was in effect a breach of the terms of the retail dealer's agreement signed by Mr. Ell, and that Presland, when he so purchased, knew that the transaction was or involved a breach by Mr. Ell of such agreement. The conduct of the defendant company was in no sense

(1) (1861) 1 B. & S. 393, 398.

malicious, nor was their motive to injure the plaintiffs. If there was any malice in the case it was on the part of the plaintiffs towards the defendant company. The defendant company were not the aggressors. They only wanted to procure and supply their customers with the goods of the plaintiffs. But the plaintiffs are annoyed because they desired to boycott the defendant company. What Mr. Ell did, whether of his own motion or at the instance of Presland, but certainly of his own free will, enabled the defendant company to frustrate to some extent the design of the plaintiffs to embarrass them in their business.

Although the subject was mentioned, I cannot say the question whether the so-called retail dealer's agreement is or is not invalid as being in restraint of trade was really argued before me. I do not, therefore, propose to discuss it.

I have mentioned that the plaintiffs had placed the defendant company's name upon the so-called "suspended list." Whether or not it was part of the plaintiffs' case that Mr. Ell knew the defendant company to be upon the "suspended list" I am not sure, having regard to the amendment made in the statement of claim, when, at the hearing, the plaintiffs struck out all the allegations of conspiracy. If Mr. Ell did not know that the defendant company were on the "suspended list" there could not have been any breach by him of the part of the condition No. 1, which relates to not selling to dealers on the "suspended list." This, however, is probably immaterial, because undoubtedly Mr. Ell did sell to or procure for Presland, and through him for the defendant company, certain of the plaintiffs' phonographic goods at less than the prescribed retail prices. He let the defendant company have the goods at trade discount prices, in fact at the same prices as he himself obtained them from Simpson & Co. The plaintiffs sustained no direct pecuniary loss by this transaction. The difference between the prices paid by the defendant company and the full retail prices, if such prices had been exacted, would have gone into Mr. Ell's pocket, not into the coffers of the plaintiffs. The plaintiffs, who only sell to wholesale dealers, they supplying the retail dealers, got the regular profit which they were in the habit of making upon all their sales. This sale to the defendant company was a direct pecuniary advantage to the

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plaintiffs, for, as their counsel insisted before me, the defendant company, who wanted the goods to sell again, would not have purchased at all, if they could not have done so except at the usual retail prices. The loss, if any, fell upon Mr. Ell, who does not, and could not, complain, he having himself made the sale to the defendant company.

Now, assuming that there was a contract between Mr. Ell and the plaintiffs not to sell their goods obtained from Simpson & Co. at less than the prescribed retail prices, the question I have to decide is whether, by reason of the transaction complained of between Mr. Ell and Presland (really the defendant company), the plaintiffs, who certainly had no contract with the defendant company, can maintain against them an action of tort upon the ground of their wrongful interference with a contractual relation between Mr. Ell and the plaintiffs. It has never yet been decided that this species of action could be maintained in such a state of circumstances as exists in the present case. No doubt it is actionable to entice away another person's servant or apprentice, to induce a person to break a contract of personal service to another, or the exclusive engagement of a professional singer, or an engagement for exclusive service in a particular manufacture. In each of these cases there is interference by the defendant with a definite contractual relation recognized by law. But in some of the reported cases there are various dicta which were insisted upon in argument before me as justifying the present action. Some of such dicta, in particular the observations of Lord Esher in *Bowen* v. *Hall* (1) and *Temperton* v. *Russell* (2), have been expressly disapproved, or I may say overruled, by the superior tribunal of the House of Lords.

What was most relied upon was a passage in Lord Macnaghten's judgment in *Quinn* v. *Leathem* (3), where, speaking of *Lumley* v. *Gye* (4), his Lordship observes: "I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with

(1) 6 Q. B. D. 333.
(2) [1893] 1 Q. B. 715, 728.
(3) [1901] A. C. 495, 510.
(4) 2 E. & B. 216.

contractual relations recognized by law if there be no sufficient justification for the interference." Upon this passage, I think, practically the whole of the legal argument before me on behalf of the plaintiffs was based. But general expressions in every judicial opinion are to be taken in connection with the facts of the case in which such expressions were used. As a rule, their possible bearing upon all other cases, without any exception, was not at the time completely considered: see the passage in Lord Halsbury's judgment in *Quinn* v. *Leathem* (1), to which I wish to refer. His Lordship says (2): "Now, before discussing the case of *Allen* v. *Flood* (3) and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

The particular observations I have read from Lord Macnaghten's judgment were made with respect to a case entirely different from the present. What was said was never intended to be, and ought not to be, treated and construed as an article of a code or a section of an Act of Parliament. Even if so construed there would still remain to be determined what was the precise meaning of the term "contractual relation" (as distinguished from a mere contract), what would be held to be interference with such a relation, and what would be sufficient justification for such interference. This case has been argued on behalf of the plaintiffs as if Lord Macnaghten had said (and indeed counsel for the plaintiffs contended) that if and whenever A. persuades or induces B. to commit a breach of any contract whatsoever which he may have entered into with C., then C., without suing B., may recover damages and obtain an

(1) [1901] A. C. 495. (2) [1901] A. C. 506.
(3) [1898] A. C. 1.

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injunction against A. Upon this I am of opinion that such is not the law at present, nor, as far as I am aware, has it ever been so laid down by any judicial authority. Rigby L.J., in *Exchange Telegraph Co.* v. *Gregory & Co.* (1), distinctly says the contrary. "It is not," says his Lordship, "as I understand the law, every procuring of a breach of contract that will give a right of action. The nature of the contract broken must be considered." For instance, sometimes it happens that a lady, having contracted to marry A., is induced to change her mind and marry B., as, it must be presumed, upon a pressing invitation by him to do so. If B. was aware of the lady's previous engagement to A., can A., instead of bringing an action for breach of promise against the lady, recover damages in an action of tort against her husband B., upon the ground that he has interfered with a contractual relation between the lady and A. and induced her to break her contract? Could A., if he commenced his action soon enough, obtain an injunction against B. to restrain him from procuring the lady to marry him? If the contention of the counsel of the plaintiffs before me be correct, these questions would have to be answered in the affirmative.

Again, suppose A. is employed by B., with a stipulation that after the termination of the engagement he shall not enter into any similar employment in the same neighbourhood, then suppose A., being no longer employed by B., enters the service of C., carrying on a similar business in the same town, can B. sue C. for damages and obtain an injunction to prevent his employing A. when he is no longer in the service of B.? We have heard lately that publishers, when they issue a book at a net price, stipulate that the booksellers they supply shall not resell within six months at less than such net price. Does any one who, within six months from the publication of such a book at a net price, asks, or if you like induces, the bookseller to let him have a copy for less than the net price, render himself liable to an action at the suit of the publisher?

I do not think that any contract by A. with B. merely not to do a particular act or particular acts—for instance, not to

(1) [1896] 1 Q. B. 147, 157

purchase goods from or sell goods to C.—constitutes a contractual relation, though it may be a valid contract between A. and B. And at all events I have come to the conclusion that in the present case, if in fact there ever was any contractual relation properly so called between Mr. Ell and the plaintiffs—which I doubt—it was not such a contractual relation as the doctrine or rule stated by Lord Macnaghten applies to. Further, the interference, to be actionable, must be shewn to be of a positive or active kind, and it must be productive of substantial, not merely nominal, damage to the plaintiffs, who cannot be entitled to recover from the defendant company higher damages than they could have recovered from Mr. Ell if they had thought fit to sue him for his alleged breach of contract. I hold that the plaintiffs could not in the circumstances of this case have recovered more than nominal, if any, damages against Mr. Ell, and that, whether they could have done so or not, this action cannot be maintained against the defendant company merely upon the ground that Mr. Ell sold to the defendant company, or that the defendant company purchased from him at less than the full retail prices prescribed in the retail dealer's agreement goods of the plaintiffs obtained from Simpson & Co.

So much for what I have called the second ground of complaint in this action. The other, that upon which it is sought to found the claim to an injunction to restrain the defendant company from procuring persons to enter, under false names, into agreements with the plaintiffs for the purchase of their goods with trade discounts, is as follows: It is alleged that two persons, Hughes and Leach, connected with the defendant company, applied in assumed or fictitious names to wholesale dealers in the goods of the plaintiffs, who had entered into what are called factors' agreements, and after signing the form of retail dealer's agreement I have already considered with the blank I have mentioned, obtained goods with the usual trade discounts and handed or transferred such goods to the defendant company. I cannot see how in these circumstances there was any breach by the wholesale dealers of their agreements with the plaintiffs. It may be that the wholesale dealers would not have dealt with Hughes and Leach if they had known who they really were and

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all about them. Any wholesale dealer who has been misled may possibly have a right of action against these persons, or perhaps against the defendant company, in respect of the deception practised; but none of the wholesale dealers who have been deceived, if they have been deceived, is suing or is a party to this action. Even if the persons (Hughes and Leach) who in assumed names obtained goods upon condition of signing the so-called retail dealer's agreement could be sued by the plaintiffs for breach of those agreements in transferring the goods obtained from the wholesale dealers to the defendant company (as to which I refer to what I have already said in the earlier part of my judgment) that would be an action of a totally different character from the present. It would be based upon the agreement signed by the persons who obtained the goods being valid and binding.

The plaintiffs, however, repudiate these agreements altogether, and decline to accept or recognize the persons who have signed them as being retail dealers. That being so, these persons are not, as it appears to me, liable to any action at the suit of the present plaintiffs, and the facts in reference to this part of the case would not in my opinion support any action by the plaintiffs against the defendant company upon the ground of unjustifiable interference by the defendant company with the contractual relation between the plaintiffs and any one else. Further, and at all events the plaintiffs could not succeed in any such action without shewing that they had sustained real damage by what Hughes or Leach did, and this has not been proved.

The result is that in my opinion this action fails altogether, and I dismiss it with costs.

R. M.

C. A.

The plaintiffs appealed. The appeal came on for hearing on November 25, 1907.

Cripps, K.C., and *Compston* (with them *Walter, K.C.*), for the plaintiffs. The action is maintainable both as regards the retailers' and the factors' agreements. In both cases the defendants knowingly interfered with contractual relations without justification and caused the plaintiffs damage, and the case comes within the law as laid down in Lord Macnaghten's

judgment in *Quinn* v. *Leathem* (1), where it was further pointed out that in this class of action it is not necessary to prove malice. Joyce J. mainly based his decision upon the view that Lord Macnaghten's statement of the law in *Quinn* v. *Leathem* (1) only applies where the contract is one involving something in the nature of personal service. That is an erroneous view. The gist of the action is interference with a legal right, and it is immaterial what kind of contract it may be: *Lumley* v. *Gye* (2); *Bowen* v. *Hall* (3); *Temperton* v. *Russell* (4); *Allen* v. *Flood* (5); *Read* v. *Friendly Society of Operative Stonemasons* (6); *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (7) The defendant company were on the plaintiffs' suspended list, and, therefore, they could not obtain the plaintiffs' machines without causing the retailers or the factors to commit breaches of their contracts, and the fact that the factors who sold to Leach and Hughes were unaware that they were really selling to the defendant company is immaterial. They, in fact, committed a breach of their agreements with the plaintiffs, though they were prevented by the fraud of the defendant company and their agents from knowing that they did so. With regard to damage, it is not necessary in an action of this sort to prove specific damage; it is sufficient to prove facts from which it may properly be inferred that some damage must result to the plaintiffs from the wrongful acts of the defendant company: *Exchange Telegraph Co.* v. *Gregory & Co.* (8) Here there is ample evidence that the sale of the plaintiffs' machines by the defendant company has caused, and will cause, damage to the plaintiffs, particularly to the branch of their business connected with the sale of their records. The only remaining question is whether the defendant company acted without justification. The plaintiffs were entitled to sell, and to refrain from selling, their machines to whomsoever they pleased. They were of opinion that it would be an advantage to them in their business if the defendant company were not in position to sell their machines, and therefore they placed the defendant company on the suspended list, as

(1) [1901] A. C. 510.
(2) 2 E. & B. 216.
(3) 6 Q. B. D. 333.
(4) [1893] 1 Q. B. 715.
(5) [1898] A. C. 1.
(6) [1902] 2 K. B. 732.
(7) [1905] A. C. 239.
(8) [1896] 1 Q. B. 147.

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they were entitled to do in the absence of any malicious motive towards the defendant company, and none is suggested. The defendant company, desiring to obtain the plaintiffs' machines, and knowing that, being on the suspended list, the factors could not supply them without violating their agreements with the plaintiffs, adopted fraudulent methods in order to obtain the machines, and it cannot be contended that their conduct in so acting was justifiable.

Hughes, *K.C.*, and *J. G. Wood*, for the defendants. Joyce J. rightly held that the action failed under both heads. The case of Ell was the only instance of a purchase from a retail dealer. There was no privity of contract between Ell and the plaintiffs, and no evidence that Ell knew that the defendant company were on the suspended list. With regard to the factors, the agents of the defendant company did by the use of fictitious names obtain machines from the factors for the defendant company, but, as the factors did not know that they were selling to persons on the suspended list, they did not commit any breach of their agreements with the plaintiffs, and the defendant company cannot be held liable for inducing a breach of contract, if no breach was in fact committed. But, even supposing that a breach of contract did result from the acts of the defendant company, there was no intention of injuring the plaintiffs, but only of benefiting the defendant company, and no actionable wrong was committed. If the defendant company's conduct was actionable, it must be a tort, and there cannot be a tort without a breach of duty. It may be that as between a manufacturer and a wholesale dealer conditions may be imposed as to the terms on which the goods shall be sold, but the manufacturer has no cause of action against a person who buys from the wholesale dealer in contravention of those terms: *McGruther* v. *Pitcher* (1); for the buyer is under no duty to the manufacturer. The cases relied on by the plaintiffs are either cases where malice was proved or where several persons were acting in combination. There is no such duty known to the law as a general duty on individuals not to induce other persons to break any contract of whatsoever kind it may be. Rigby L.J., in *Exchange Telegraph Co.* v. *Gregory & Co.* (2),

(1) [1904] 2 Ch. 306. (2) [1896] 1 Q. B. 157.

pointed out that it is not every procuring of a breach of contract that will give a right of action. The expression "contractual relations" used by Lord Macnaghten in *Quinn* v. *Leathem* (1) must obviously be read subject to some limitation, otherwise the word "contract" would have been used. The course of the authorities shews that what is meant is not the relation which exists between the parties to every kind of contract, but something akin to a personal relation, such as exists between master and servant, employer and employed, or partners. Further, the action cannot be maintained without proof of damage, and there is in this case no real evidence of damage. It is not suggested that there was any direct damage, for the plaintiffs got the price for the machines bought by the defendant company for which they bargained; and the evidence as to the anticipated loss on the sale of records is mere surmise, and in any case that damage is far too remote to be recoverable. Lastly, the sale to the defendant company was not a breach of the agreements entered into by the factors and the retailers. Those agreements prohibited sales to persons on the plaintiffs' suspended list, and the agreements define those who are to be on the suspended list as persons who have violated any of the conditions of the agreements. The defendant company did not come within this definition, and, therefore, their name was improperly placed on the suspended list.

Compston in reply.

Cur. adv. vult.

1907. Dec. 18. Lord Alverstone C.J. In this case I have had the advantage of reading the judgments which have been prepared by my brothers Buckley and Kennedy, and I desire to add nothing to the statement of the law embodied in the judgment of my brother Buckley L.J. But, having regard to the view expressed by my brother Joyce, and as I am differing from him on one part of the judgment, I ought to state briefly the reasons which prevent me from being able to concur in that judgment. It is, in my opinion, clearly established that an illegal act causing injury to a person, or to his rights of property,

(1) [1901] A. C. 510.

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is an actionable wrong and affords ground for an action on the case. I will not detail at length the facts, as they are very clearly stated in my brother Joyce's judgment, and it is not necessary that I should repeat them. It is only necessary for me to say that the part of the judgment of my brother Joyce from which I differ is that in which he thinks that the plaintiffs have not established a cause of action in respect of the transactions between the defendants and the factors. Now, for that purpose, all that I need read is the condition in the document called the factors' agreement — I should call them "wholesale agents"; but, however, "factors" is the word that has been used, and I adopt it. The words are "Factors must not sell or supply or place on consignment, either directly or indirectly, Edison phonographs, or parts thereof, records or blanks to any dealer who has not signed the agreement required by the National Phonograph Company, Limited, governing and controlling the sale of same, nor to dealers who are on our suspended list." It was suggested in argument that this restriction imposed by the plaintiffs upon the factors was open to some objection. I am unable to appreciate upon what ground any such objection can be founded. The defendants were competitors in trade with the plaintiffs—I think it may not unfairly be said the principal competitors of the plaintiffs. The sale of phonographs carries with it, to a very large extent, the sale of records for use on the instruments, and I can see no reason why the plaintiffs are not entitled to say, We will take all legitimate means in our power to prevent our instruments from being sold by our competitors, as we know that if they are in a position to sell our instruments they will, to a large extent, interfere with the sale of the records which are to be used with such instruments. One does not want to enter into any controversial matter between these parties more than is necessary. The defendants' firm had undoubtedly the right to call themselves "Edison-Bell," and to call their instruments "Edison-Bell." That had been the subject of a previous dispute, and was finally settled by a consent order and bargain between the parties, and it was not disputed that the plaintiffs were the persons who were able to import into this country instruments suggested to be the last development

or improved phonograph, and, therefore, inasmuch as it was obviously desirable to be able to sell these phonographs, and inasmuch as it is common ground that the sale of the phonographs does carry with it a considerable business in records, I cannot see any objection to a trader in such a trade saying that he will not, if he can help it, allow his machines to be at the disposal of his trade rivals. In these circumstances, the factors having purchased goods upon the terms, as I have already said, that they should not be sold to the defendants—because there is no doubt that the defendants' name was on the suspended list; the action of the defendants shews that it was, and that they knew it—the defendants, by fraud, induced the factors to sell instruments to them. Now I pause to say that it is, to my mind, a practical commentary on that which I have said that the plaintiffs' competitors in trade knew that they could not get these goods by going openly to the defendants' agents. They wanted them for the purposes of competition, and they adopted fraudulent means to get them. In my opinion, if such fraudulent action has caused injury to the plaintiffs' trade, or is likely to cause injury to the plaintiffs' trade, an injunction ought to be granted to put a stop to such a practice, and, if damage is proved, then there ought to be an inquiry as to damages. It was stated in evidence by the plaintiffs' witnesses, and not denied, that the possession of the phonograph, whosesoever it be, does largely control or affect the trade in the records to be used; and, therefore, although the plaintiffs got the purchase price of the phonograph, I think that the action of the defendant company was likely to cause damage, and that there is sufficient evidence that it has, in fact, caused damage. There should be an injunction to restrain the defendants from, by fraudulent and improper means, inducing the factors to break their agreement with the plaintiffs. As to the form of the injunction, possibly the learned counsel for the plaintiffs will assist us in settling its terms.

With regard to the retail dealers, I entirely concur with the judgment of my brother Joyce, but I had better just state my own reasons. I doubt very much whether there was a contract between the retail dealers and the plaintiffs. I will not say that, under some circumstances, the wholesale factors may not be the

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agents of the plaintiffs to make a contract with the retail dealers, but in my judgment no such contract was established in this case. The case did not proceed on that basis. I should require a good deal more evidence as to the terms and circumstances of the contract before I came to the conclusion that there was a contract between the plaintiffs and the retail dealers, as distinguished from the contract between the factors and the retail dealers. Secondly, in my opinion, another main objection to the plaintiffs succeeding on this part of the case is that the defendants did not use any fraudulent means to obtain the instruments from the retail dealers. The retail dealers knew perfectly well that they were selling to the defendants, and further, with regard to the Ell transaction, that is, the transaction with Mr. Ell, there is no evidence that that particular transaction caused any damage to the plaintiffs at all.

I am therefore of opinion that the judgment should be varied by granting an injunction in respect of the conduct of the defendants with respect to the factors, and that the judgment should be affirmed with regard to the transaction with the retail dealers.

BUCKLEY L.J. read the following judgment:—The respondents have addressed to the Court an argument to the effect that the defendants, the Edison-Bell Company, were not on the suspended list in the sense in which those words are employed in the factors' agreements. In my opinion there is nothing in the point. The defendants were, and knew that they were, and used deceit because they were, on the suspended list. Those words in the factors' agreements include, no doubt, factors who, under article 10, are placed on the suspended list. There is nothing to confine the words to that class of persons. The relevant facts are that by contract subsisting between the plaintiffs and the factors the latter were contractually bound to the former not to sell to the defendants, and that the defendants, by deceit, induced the factors to sell to the defendants contrary to the duty which the factors contractually owed to the plaintiffs. The question to be determined is whether it is an actionable wrong that the

defendants have, by deceit, induced the factor, who had contracted with the plaintiffs, to act contrary to the duty which he contractually owed to the plaintiffs.

The law bearing upon the matter has been exhaustively considered in three recent cases in the House of Lords—namely, *Allen* v. *Flood* (1), *Quinn* v. *Leathem* (2), and *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (3) In the speeches of the learned Lords in those cases the earlier authorities from *Lumley* v. *Gye* (4) onwards have been exhaustively examined and discussed. No useful purpose could be answered by attempting to travel through the cases again. I take the law which I have to apply from two passages which I will read. In *Allen* v. *Flood* (5) Lord Watson says: "There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye* (4), the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party." In *Quinn* v. *Leathem* (6) Lord Macnaghten says: "Speaking for myself, I have no hesitation in saying that I think the decision"—in *Lumley* v. *Gye* (4)—"was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference." The respondents sought to argue that the principles found in the cases to which I have referred are confined to cases of conspiracy. The argument, I think, is not well founded. The judgments are not

(1) [1898] A. C. 1.
(2) [1901] A. C. 495.
(3) [1905] A. C. 239.
(4) 2 E. & B. 216.
(5) [1898] A. C. 96.
(6) [1901] A. C. 510.

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based upon the existence of a conspiracy, and Lord Lindley, in *Quinn* v. *Leathem* (1), says: "One man exercising the same control over others as these defendants had could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action." The respondents further argued that an action will not lie unless the defendants' act was intended to damage the plaintiffs. Assuming (contrary as I think to the fact) that it could be maintained in this case that the act of these defendants was not intended to damage these plaintiffs, the proposition is not, I think, one which can be maintained. I find Lord Halsbury, in the *South Wales Miners' Case* (2), saying that if the miners there were sincerely in the belief that their employers would benefit by their collieries being interrupted that was no sort of excuse for breaking a contract when the co-contractor refused to allow the breach.

I proceed, then, to apply the words of Lord Watson and Lord Macnaghten to the facts of this case. These defendants knowingly, and for their own ends, induced the factor to sell to them contrary to the duty which the factor owed to the plaintiffs. The factor was deceived, and, for that reason, an action for breach of contract may not lie against him. He acted innocently, and did not voluntarily commit any breach of his contract. In my judgment this does not differentiate the present case in the respondents' favour from the first proposition found in Lord Watson's words. The defendant company is in no better case because the wrong to the plaintiffs which, in fact, was done was, by reason of the defendants' deceit, done innocently so far as the factor was concerned. Again, if this is not well founded, then, in my judgment, Lord Watson's second proposition at any rate applies. Assuming that the act induced was within the right of the factor in the sense that he, being innocent, did no wrong, and was therefore not wrongful so far as the factor was concerned, yet it was to the detriment of a third party, namely, the plaintiffs. In that case, says Lord Watson, the inducer, that is, the defendants, may be held liable if the defendants can be shewn to have procured their object by the use of illegal means

(1) [1901] A. C. 537. (2) [1905] A. C. 239.

directed against the plaintiffs. The deceit which the defendants practised brings them, I think, exactly within these words. Let me now take Lord Macnaghten's words. The act which the defendants did was, I think, a violation of a legal right of the plaintiffs, because it interfered with the contractual relations subsisting between the plaintiffs and the factors, and there was no sufficient justification for such interference.

There is another ground upon which the same conclusion may be based, and that is interference with rights of property. The business of the plaintiff company was property. The sale of phonographic machines induced the purchase, by the purchasers of such machines, of accessories to be used with them, the principal subject-matter being records, whose sale produced a profit much larger than that made on the machine itself. The purchase by the defendants of the 700 or other number of machines which they, in fact, bought might affect the subsequent sale by the plaintiffs of the records, and thus affect the plaintiffs' property in their business. "No man," says Lord Justice Bowen, in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1), "whether trader or not, can justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights contractual or other, assuming always that there is no just cause for it." In *Exchange Telegraph Co.* v. *Gregory & Co.* (2) an action was held to be maintainable which thus affected property. It is the third case put in Rigby L.J.'s judgment—that is to say, "an attack made upon the right or interest of persons in the business which they carry on." In such case, he says, the fact of damage is the thing which brings the defendant into relation with the plaintiff.

Upon these grounds I think that it was an actionable wrong that the defendants, by deceit, induced the factors to act contrary to the duty which they contractually owed to the plaintiffs, and that this action will lie.

The case of the retail dealers, to which the learned judge directed the principal part of his judgment, stands in a different position. The case proved is that of the purchase from Ell.

(1) (1889) 23 Q. B. D. 598, 614. (2) [1896] 1 Q. B. 147, 156.

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I need not stay to consider whether the plaintiffs could make out an agreement between the plaintiffs and Ell, the retail dealer, upon the footing that Simpson, the factor, was the plaintiffs' agent to obtain the signature by Ell of the agreement expressed to be made with the plaintiffs. That question has not been thoroughly argued. Assuming that such an agreement could be made out, it remains that the defendants in the case of Ell practised no deceit. Ell was told that the goods were for the defendants, and thought that they were entitled to have them. He did it to oblige the Edison-Bell Company, and handed on the goods at the price which he paid for them, making no profit. I say no more about the case of the retail dealers.

As regards the factors, I think there was an actionable wrong. Marks's evidence is, I think, sufficient to support an inquiry as to damages and an injunction in proper terms.

It seems to me that it would be right to grant an inquiry as to damages and an injunction to restrain the defendant company, their servants and agents, from inducing any persons or firms who have entered into factors' agreements with the plaintiff company to deal with the defendant company in goods of the plaintiff company by representing or leading to the belief that the purchaser is not the defendant company. But I am willing to hear what the parties have to say as to the proper form of injunction, for, although at the hearing of the appeal I invited the plaintiffs to formulate the exact form of injunction to which they said they were entitled, I obtained no substantial answer to that question, and the defendants have had no opportunity of contesting the exact form in which the injunction should go. I think the appeal should be allowed and an order made in the above terms.

KENNEDY L.J. read the following judgment:—In this case the plaintiffs' claim for damages and an injunction is based upon two distinct sets of circumstances, with which I will deal in the same order as that in which they have been dealt with in the judgment appealed against. The real defendant is the defendant company. The other defendants are practically nominal defendants only. The plaintiffs deal in phonographs and phonographic

goods. These they sell to wholesale traders, whom they call factors, and they in their turn resell to retail dealers. The plaintiffs act upon a system of restrictive and exclusive trading. They exact from the factors who purchase from them an agreement not to sell to retail dealers except for certain discounts which the plaintiffs prescribe; not to sell to any retail dealers who decline to sign an agreement form to which I will presently refer; and not to sell to any person whose name is on a list which they describe as "our suspended list," and which, although it is in the agreement itself only stated to include those who are referred to in the seventh condition, is a list in which the plaintiffs include the name of any person whom they choose in this way to proscribe. If a factor fails to observe any of these or certain further stipulations of the agreement, he may be at once cut off from any further supply of goods and be placed on the suspended list. The retail dealer's agreement, which he must sign and give to the factor before he can buy from the factor, purports to bind the retail dealer (inter alia) not to sell to any one at a discount or at less than current list prices, or to any dealer who is on the plaintiffs' suspended list. If a retail dealer fails to observe any of the stipulations, he may be placed by the plaintiffs on their suspended list, and so be cut off from any further supply of goods. The justification alleged by the plaintiffs for this system consists, as alleged by them, in the maintenance of price and the encouragement to hold large stocks of the plaintiffs' wares, which the assurance of this is said to afford to factors and dealers. The exclusion which insertion in the plaintiffs' list declares is intended by the plaintiffs to act, first, in the case of factors and dealers, as a deterrent against transgression of any of the stipulations of their respective agreements which the plaintiffs wish to enforce; and, secondly, as a hindrance to competing firms, who sell either their own make of phonographs and phonographic accessories, or similar kinds of goods which have been manufactured by firms—of whom there are several—other than the plaintiffs, and from whom, if they were able also to sell the plaintiffs' phonographs, the purchaser of a phonograph would very likely also buy the records (inasmuch as all the records are constructed for use in connection with any phonograph) which

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the competing firms supply at a lower price (1*s.*, as against 1*s.* 6*d.*) than the plaintiffs. The plaintiffs allege that experience indicates that a buyer is likely to get his records from the firm from whom he has bought his phonograph, and, therefore, a buyer who purchases from the defendants, or from any other of the plaintiffs' competitors, one of the plaintiffs' order of phonographs will probably not go to one of the dealers to whom they supply them to buy the more expensive records of the plaintiffs' make, but will buy the cheaper records produced by the defendants or by other firms. The buyer of a phonograph may wish to buy for his own instrument a hundred or two hundred, or even more records.

The defendant company, towards whom the plaintiffs evidently entertain no very friendly feeling, are sellers as well as manufacturers of phonographs and phonographic accessories, and wanted to procure, and be able to supply customers with, goods of the plaintiffs. The plaintiffs desire to prevent the defendant company from having this trade, and to that end they have placed the name of the defendant company on the suspended list. The defendant company have sought (I take the words from the finding of the learned judge) "to frustrate to some extent the design of the plaintiffs to embarrass them in their business." The question, which my brother Joyce has answered in the negative, is whether or not the defendant company has committed an actionable wrong in the execution of their attempts.

The first claim of the plaintiffs arises under the following circumstances. In the latter part of the year 1904 the defendants sent one of their employees, Presland by name, to a Mr. Ell, who carried on business as a dealer in phonographic materials in the City of London. In July, 1903, on the occasion of a purchase from one Simpson, a factor, of some of the plaintiffs' goods, Ell had signed a document in the terms of the retail dealer's agreement. Presland saw Ell in reference to obtaining some of the plaintiffs' phonographs for the defendant company, and Ell arranged to get, and did get, for the defendant company, from Simpson, twenty-five machines, purchasing himself, paying Simpson for the machines at the price at which Simpson was authorized by the factor's agreement to sell the machines,

and receiving the money from the defendants in order to enable him to make the payment to Simpson. Ell made no profit out of the transaction. Ell apparently thought that the defendant company was entitled to have the machines, and he acted without any advantage to himself, and simply to oblige the defendant company. The plaintiffs in respect of this transaction claim damages and an injunction, alleging that the defendants committed an actionable wrong towards them by procuring and inciting Ell to break his retail dealer's agreement, first, by selling to the defendants, or procuring from Simpson for the defendants, these twenty-five phonographs at a price less than the retail price specified in the retail dealer's agreement; and, secondly, by selling to the defendant company, although the defendant company was on the suspended list.

We now come to the plaintiffs' second and separate head of claim. The defendant company, by two servants or agents named Hughes and Leach, bought from certain factors who had in stock goods of the plaintiffs' manufacture and had signed the factor's agreement a certain number—I think about nineteen in all—of the plaintiffs' machines and tried to obtain more in the same way. Hughes and Leach bought at "agreement" prices, that is, at prices approved by the plaintiffs. But, in order to effect the purchases, Hughes and Leach in each case untruly represented themselves as independent dealers, and when they bought the goods and signed the retail dealer's agreement form gave to the factors fictitious names and fictitious addresses, so that the factors did not know that they were selling to the defendant company, or to servants of the defendant company, or to any person on the plaintiffs' suspended list. There can be no doubt that this method of purchase was authorized by the defendants. That Hughes and Leach and the defendant company which employed them did what was morally wrong is patent. They induced the factors to sell these goods to them by an untrue representation, not indeed in order to defraud either the factors or plaintiffs in any pecuniary respect, for they paid the price which the plaintiffs had authorized the factors to accept; but it must be assumed that, if the factors had known that they were selling to persons who were agents of

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a firm on the plaintiffs' suspended list, they would not have sold to Hughes or Leach any of the machines which had been obtained from the plaintiffs. The plaintiffs claim that they are entitled to damages from the defendants as having in this transaction incited or procured the factors to sell the machines to the defendant company in violation of the agreements entered into by the factors with the plaintiffs. The learned judge has given judgment for the defendants in regard to both of the transactions.

In regard to the first, which I will call the Ell transaction, he has held, first, that there was no contract existing between the plaintiffs and Ell upon which the plaintiffs could have successfully sued Ell; secondly, that the plaintiffs failed to prove that the defendant company or Presland directly procured or incited Ell to violate the contract, if any existed; thirdly, that, if any contract existed between the plaintiffs and Ell, it did not create a contractual relation between them within the meaning of Lord Macnaghten's judgment in *Quinn* v. *Leathem* (1); and, fourthly, that the plaintiffs had failed to prove the real and actual damage which was essential to their case. I agree with Joyce J. as to the first of these grounds; as to the second, which is one of fact, I should be slow to differ from the learned judge who himself heard the witnesses give their testimony. If either of these conclusions is correct the plaintiffs' claim on this part of their case fails, and it is unnecessary for the purposes of this appeal to consider the third and fourth grounds on which the learned judge has also decided adversely to the plaintiffs. I reserve, till I deal with the Leach and Hughes case, any consideration of the question of damage. But, as the question of contractual relation involves a legal point of much general importance, and as, with sincere respect, I am not disposed to concur in the view which Joyce J. has expressed, I do not think that, whilst agreeing for other reasons with the result of his judgment on this branch of the case, I ought to pass over the point altogether without comment. The learned judge holds that a valid contract by A. with B. not to do a particular act or acts—for instance, not to purchase goods from or sell goods to C.—does not constitute a contractual relation in the sense in

(1) [1901] A. C. 495.

which Lord Macnaghten must be understood to have used that phrase in *Quinn* v. *Leathem* (1), and in substance, as I understand his judgment, that an action at the suit of B. against one who procured or incited A. to break his contract not to do the particular act or acts could not properly be based upon any principles which are laid down in such cases as *Lumley* v. *Gye* (2), *Quinn* v. *Leathem* (1), and *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (3) Now, I agree that in these cases, as well as in *Bowen* v. *Hall* (4) and *Temperton* v. *Russell* (5), the contractual relation, which the parties sued in those cases were held to have unlawfully interrupted, involved something more than an obligation to abstain from doing a particular act or acts. In each case there subsisted between the contracting parties, by virtue of the contract, that which, for want of a better phrase, I think might be described as a more or less continuous course of dealing, as, for example, of personal service, though the case is not confined to personal service, of which without justification the party sued had successfully tried to procure the rupture. I agree with the defendants' counsel that the decision of the Court of Appeal in *Exchange Telegraph Co.* v. *Gregory & Co.* (6), cited by the plaintiffs, does not throw light upon this part of the case when carefully looked at. That decision, as is correctly stated at the close of the head-note in the *Law Reports*, simply was that the plaintiffs in that case had a right of property at common law, and were entitled to an injunction to restrain the defendant from infringing that right. And, indeed, in the following passage in his judgment Rigby L.J. suggested that there is some limitation: "It is not every procuring of a breach of contract that will give a right of action." I am not aware of any case in which the line or nature of the limitation has been defined. But, if it had been necessary, which it is not, to decide the point, I do not see how, in view of the decisions of the House of Lords to which I have just referred, and of the language used by Lord Watson in *Allen* v. *Flood* (7), Lord

(1) [1901] A. C. 495.
(2) 2 E. & B. 216.
(3) [1905] A. C. 239.
(4) 6 Q. B. D. 333.
(5) [1893] 1 Q. B. 715.
(6) [1896] 1 Q. B. 147, 157.
(7) [1898] A. C. 1.

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Lindley in *Quinn* v. *Leathem* (1) and Lord Macnaghten in the same case, I could concur with Joyce J. if he has held that in no circumstances could the intentional procurement of a breach of contract not to do a particular act constitute in law an actionable wrong.

The case made out by the plaintiffs in regard to the Hughes and Leach transactions appears to me to differ, in important respects, from the Ell transaction. By intentional misrepresentation the defendant company, through their agents or servants, procured from the factors goods of the plaintiffs' manufacture which the factors would not have parted with if they had known that the persons with whom they were dealing were agents or servants of a firm included in the suspended list. There has been, in a sense, a sale contrary to the terms and the intention of the factor's agreement. Then comes the question, Did such a transaction constitute, on the part of the factors, in each case an actionable violation of their contract with the plaintiffs, which I assume to be valid in point of law? I do not think it did. The factors did not know, or have reason to suppose, that they were selling to the defendants; on the contrary, they were intentionally misled by Hughes and Leach into the belief that they were selling to independent retail dealers, who had their own places of business and were in no way connected with the defendants. The names given by Hughes and Leach were not names on the suspended list. It seems to me that a sale honestly made by a factor under these circumstances ought not, according to the proper interpretation of the agreement, to be held to be a sale to a person on the suspended list, and, as such, constituting a breach of the agreement. The defendants' counsel contended that, if this be so—if the plaintiffs could not successfully sue the factor for damages or justly place him on the suspended list under the seventh condition—the plaintiffs' case at once fails, because (they argue) the defendants' stratagem, however reprehensible, did not produce a violation by the factors of the contracts with the plaintiffs. I think that this is too narrow a view. I am certainly disposed to hold that if A., who knows that B., the producer of an article, has stipulated in selling it to C., the factor, that he shall not resell it to A., procures

(1) [1901] A. C. 495.

by an intentional misrepresentation to C. a sale to himself, he has committed towards B. an actionable wrong (provided that B. can prove he has been thereby damaged) although, in the particular circumstances, B. may have no cause of action against C. in respect of the transaction. I agree with the defendants' counsel that *Exchange Telegraph Co.* v. *Gregory & Co.* (1) is not an authority for such a proposition, for in that case the subscriber who improperly supplied the defendant with the information in which the plaintiffs had proprietary rights must have known that he was violating his contract with the plaintiffs in so doing. There is no suggestion in the case, as reported, that he did not. But I think a sufficient declaration of the soundness of the view which I have expressed appears in a passage in the judgment of Bowen L.J. in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (2), to which my attention has been drawn: "No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it." And in *Allen* v. *Flood* (3) Lord Watson remarks: "When the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye* (4), the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party."

Whilst, however, I so far venture to differ from Joyce J., who has held in his judgment that the facts in reference to this part of the case would not support any action by the plaintiffs against the defendant company upon the ground of unjustifiable interference by the defendant company with the contractual relation between the plaintiffs and any one else, still his judgment on this part of the case also will stand, if we ought to concur with the learned judge upon the finding as to the absence of evidence of damage with which his judgment concludes. It is indisputable,

(1) [1896] 1 Q. B. 147.
(2) 23 Q. B. D. 614.
(3) [1898] A. C. 96.
(4) 2 E. & B. 216.

C. A. 1907

NATIONAL PHONOGRAPH COMPANY, LIMITED v. EDISON-BELL CONSOLIDATED PHONOGRAPH COMPANY, LIMITED.

Kennedy L.J.

I think, that damage is the gist of actions such as the present; that in order to succeed and make a good case for either damages or an injunction damage must be proved, not, indeed, damage in detail or special damage in the narrow sense of that epithet, but actual damage—damage, that is to say, which has been, or, where an injunction is sought against the continuance or the repetition of the act complained of, which will be, the natural consequence of the act complained of. In the present case the learned judge, on this point, has found as follows: "Further and at all events the plaintiffs could not succeed in any such action without shewing that they had sustained real damage by what Hughes or Leach did, and this has not been proved." The plaintiffs did not and could not allege direct pecuniary damage, but they put their damage thus: First, injury to their business, because it is more probable that, if the machines had not been sold to the defendants and had been sold by the factors to retail dealers bound by the retail dealers' agreement, the retail dealers would have bought from the factors, and the ultimate buyers from the retail dealers would have bought from the retail dealers the records of the plaintiffs' manufacture, and, as the defendants got the machines, the records purchased would have been other than records of the plaintiffs; secondly, injury to the plaintiffs' business owing to persons thinking that they could purchase the plaintiffs' machines from the defendant company, and ultimately, at the defendant company's place of business, being induced to buy Edison-Bell machines; and, thirdly, injury to the plaintiffs' business, because, if retail dealers saw machines of the plaintiffs' make in the windows of the defendant company and heard or knew that the defendant company was on the plaintiffs' suspended list, they would infer that the plaintiffs were incapable of maintaining their agreements, and, therefore, would not stock the plaintiffs' goods. I have felt considerable doubt as to the sufficiency of this proof of damage. The judgment of the Court of Appeal in *Exchange Telegraph Co.* v. *Gregory & Co.* (1) was cited by the plaintiffs' counsel. But all that that case decided is that, where the infringement of a right of property at common law has been proved, the

(1) [1896] 1 Q. B. 147.

damage need not be proved in detail. It is enough if the facts proved shew that actual and substantial damage is the natural result. The second and third of the plaintiffs' heads of damage appear to me to be too uncertain and remote to be considered. In regard to the first head—the effect upon the sale of the plaintiffs' records—I have come to the conclusion that there is sufficient substance in it to justify an injunction, and, if they ask for it, an inquiry as to damages, although I cannot help thinking that there will be considerable difficulty in establishing any particular figures of loss. But certainly the plaintiffs' witnesses, Mr. Marks and Mr. Lemoin, have given some evidence as to the value of the maintenance of the plaintiffs' exclusive system in regard to their machines as affecting the sale of records, and some evidence that there has been a falling off in their sale of records since the time when, as they suggest, the defendants have interfered with that system by such devices as the defendant company has to admit in the cases of Hughes and Leach, and have so obtained, if the defendants are to be believed, several hundreds of the plaintiffs' machines. One ought not, I think, to leave out of sight, in justice to the plaintiffs, when judging of the weight of their evidence upon this question of damage, the inference which may fairly be drawn from the fact that the defendants, a firm of some standing, should have cared so much —presumably for reasons of resulting profit to themselves—to get hold of the plaintiffs' machines that they condescended to a system of deception in order to attain this object. No evidence was offered by the defendant company at the trial to answer the evidence given by the plaintiffs. Upon the whole, whilst I think, upon the point of damages, the case is near the line, and I differ reluctantly from the learned judge who has tried the case and heard the witnesses on a question of fact, I concur with the Lord Chief Justice and Buckley L.J. that, in respect of the Hughes and Leach transaction, the plaintiffs have proved their right to relief.

C. A. 1907

NATIONAL PHONOGRAPH COMPANY, LIMITED v. EDISON-BELL CONSOLIDATED PHONOGRAPH COMPANY, LIMITED.

Kennedy L.J

The defendant company agreed to an injunction in the form suggested by Buckley L.J.

Solicitors: *Ward, Perks, & McKay; Faithfull & Owen.*

F. O. R.

JOYCE J.
1907
Dec. 12.

In re SHARP.
MADDISON *v.* GILL.

[1907 S. 434.]

Will—Construction—Gift of Residue to A., B., and the "Six Children now living" of C.—All but one of C.'s Children dead at Date of Will—Presumption of Mistake — Rejection of specified Number — Residue divisible amongst A., B., and surviving Child.

A testator gave the residue of his estate to his trustees upon trust for certain named persons and the six children of the late S. F. O. in equal shares as tenants in common. By a codicil the testator explained that by "the six children of the late S. F. O." he meant and intended to benefit "the six children now living of the said S. F. O. by his first wife E. O. formerly E. S. and no others." At the date of the will five of the six children of S. F. O. by E. O. were dead, the last of the five to die being referred to by the testator in his will as "my late niece S. M." The survivor of the six was the defendant E. P.:—

Held, that the children referred to in the will and codicil were the living children of S. F. O. by E. O.; that the Court would reject the specified number "six" on the ground of presumption of mistake; and that the residue was divisible equally amongst the specifically named legatees and E. P.

The principle upon which *Garvey* v. *Hibbert*, (1812) 19 Ves. 125, was decided applied to the converse case where the number of the children in existence is less than that specified in the will.

Adjourned Summons.

By his will dated March 13, 1905, John Sharp, the testator, appointed the plaintiffs executors and trustees of his will, and amongst other legacies, including legacies to the defendants John Gill and Edgar Gill, gave "to the three daughters of my late niece Sarah Mitchell two hundred and fifty pounds each to the six children of the late Samuel Frederick Okey two hundred pounds each." The testator then gave the ultimate residue of his estate, both real and personal, to his trustees, "upon trust for the said John Gill the said Edgar Gill the said three children of the said Sarah Mitchell and the said six children of the said Samuel Frederick Okey in equal shares as tenants in common."

By a codicil dated May 17, 1905, to his will the testator recited and declared as follows: "Whereas by my said will I

have amongst other legacies and bequests given to the six children of the late Samuel Frederick Okey certain legacies and shares in my residuary estate Now I hereby declare that by such words 'the six children' of the late Samuel Frederick Okey I mean and intend to benefit the six children now living of the said Samuel Frederick Okey by his first wife Elizabeth Okey formerly Elizabeth Sharp spinster and no others."

Testator died on December 17, 1906, aged eighty-six, and his will and codicil were proved by the plaintiffs on January 9, 1907.

Elizabeth Okey, formerly Elizabeth Sharp, mentioned in the codicil, was the testator's sister, and was married to Samuel Frederick Okey in 1832. She died in 1845, having had six children by S. F. Okey, of whom five were dead at the date of the testator's will. The first of them died seventy-one years, the second fifty-four years, the third forty years, previous to the date of the will; the fourth died in 1904, and the last of them, who was "my late niece Sarah Mitchell" mentioned in the will, died in February, 1905. The defendant Elizabeth Patrick was the survivor of the six children, and was also one of the testator's next-of-kin.

John Sharp Okey, the eldest son of Samuel Frederick Okey and Elizabeth Okey, died in 1865, leaving five children, all of whom were defendants.

After the death of his first wife, Elizabeth Okey, Samuel Frederick Okey married again, and had fourteen children by his second wife, of whom seven were still living and were defendants.

The plaintiffs took out this summons for the determination of (inter alia) the questions whether the legacies bequeathed to the six children of the late Samuel Frederick Okey had lapsed, and whether the testator's residuary estate was divisible in six equal shares between the defendants John Gill, Edgar Gill, and the three children of Sarah Mitchell and the defendant Elizabeth Patrick, or whether his residuary estate was divisible in eleven equal shares, of which five shares lapsed and were undisposed of, and passed as to the five shares in real estate to the testator's heir-at-law and as to the five shares in personal estate to his next-of-kin.

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T. T. Methold, for the plaintiffs.

Norton, K.C., and *Wace*, for the first defendants, J. and E. Gill and the children of Sarah Mitchell. The testator meant that only those of the six children of S. F. Okey and Elizabeth Okey who were living should take. It is a case of falsa enumeratio. Instead of six being alive only one was living, and he meant that one to take. These defendants take one sixth each, and the defendant Mrs. Patrick takes the remaining one sixth. There are no reported decisions where, as in this case, more legatees than were in existence have been mentioned, but there are many cases in which too few legatees have been mentioned; and the result of the decisions in those cases appears to be that, if the number mentioned does not correspond with the number living at the date of the will, all the children then living will take, whether the gift is of a lump sum or of a distinct sum to each, in which latter case such child will be entitled to a legacy of that sum: Theobald on Wills, 6th ed. p. 293.

[JOYCE J. referred to *Lord Selsey* v. *Lord Lake* (1), where a gift to the five daughters of A., who had one daughter and five sons, went to the daughter.]

That was a very special case. There was a life estate and then a gift over to the five daughters and the survivors and survivor, and it was clearly intended that one daughter should ultimately take.

[JOYCE J. referred to *In re Dutton*. (2)]

The only case of a gift of a share of residue is *Clarke* v. *Clemmans* (3), where, after specific legacies to ten legatees and to the widow of his late brother J. C., the testator gave his residue upon trust for the ten legatees and J. C. in equal shares as tenants in common, and it was held that the words "the widow of" could not be inserted before J. C. in the gift of residue, and that there was no intestacy as to J. C.'s share, but that the residue was divisible amongst the ten legatees in equal shares. We submit that that decision covers this case. Whatever might have been the result if the will had stood alone, it is quite clear from the codicil that the testator meant only living persons to

(1) (1839) 1 Beav. 146, 151. (2) [1893] W. N. 65.
(3) (1866) 36 L. J. (Ch.) 171.

take, and it is only the child or children now living who take a share.

We submit, therefore, that the residue is divisible amongst these defendants and Mrs. Patrick, the surviving child, that is, in equal sixth shares, and that there is no intestacy. If, on the other hand, it be the true construction that the residue is divisible into eleven shares, then we submit that there will be a failure as to five of those shares.

Upjohn, K.C., and *Austen-Cartmell*, for the defendant Elizabeth Patrick. It is more to the interest of this defendant, she being also one of the testator's next-of-kin, to contend that there is a gift of the residue in eleven shares and a failure of the gift as to five of those shares than to adopt the division for which the first defendants contend, and under which Mrs. Patrick would only get one sixth share of the residue.

There is a plain gift in the will to eleven people in equal shares, and the codicil is really nothing but interpretation. There must have been a mistake or misdirection in giving the instructions for the will, but there is nothing which calls for elucidation, and the words of the will and codicil must be taken to be the words of the testator: *Bernasconi* v. *Atkinson* (1); *Charter* v. *Charter*. (2)

If a testator says, "I give a legacy to A.," that would imply that he believes that A. is alive at the time of the gift, and if it turns out that A. was dead at the time of the will then the gift fails, and the same result will happen where the gift is of a share of residue.

This is a good gift of one eleventh share to each of the six children, notwithstanding that some of them were dead at the time of the gift; but there is a failure of the gift, and an intestacy as to the aliquot shares of those who are so dead: *Cresswell* v. *Cheslyn* (3); *Sykes* v. *Sykes* (4), *In re Wood's Will* (5); *In re Richerson* (6); *Skrymsher* v. *Northcote* (7); *Aplin* v. *Stone*. (8) There were certain words in the will in *In re Palmer* (9),

(1) (1853) 10 Hare, 345, 348.
(2) (1874) L. R. 7 H. L. 364, 386.
(3) (1762) 2 Eden, 123; affirmed on appeal, (1763) 3 Bro. P. C. 246.
(4) (1868) L. R. 3 Ch. 301.
(5) (1861) 29 Beav. 236.
(6) [1892] 1 Ch. 379.
(7) (1818) 1 Swans. 566.
(8) [1904] 1 Ch. 543.
(9) [1893] 3 Ch. 369.

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overruling *Humble* v. *Shore* (1), which amounted to a gift to the other residuary legatees, and the decision in that case does not affect the decision in *Cresswell* v. *Cheslyn* (2) or *Sykes* v. *Sykes.* (3)

From the expression of intention in the present case the testator must be taken to have forgotten that five of the children were then dead, and on that ground this case is distinguishable from *Clarke* v. *Clemmans.* (4) The contention of the first defendants involves the rejection of the word "six." We submit, however, that it ought not to be rejected, but retained and the residue divided into eleven shares.

Sargant, for the heir-at-law and next-of-kin. There is an intestacy as to five eleventh shares. There is this difference between a gift of residue where there are more legatees to take than are mentioned and a gift where there are fewer to take than are mentioned—namely, that in the latter case, if the property is given to the few, it is being taken away from the heir-at-law and next-of-kin.

This is not a question of deficiency in the legatee to take, but the only question is how is that which is given to be divided. It is not like the case of a gift to a charity which has ceased to exist before the date of the will where the gift simply fails, but it is precisely analogous to the case of an appointment to objects and non-objects of the power. By their decease the five children became non-objects of the power, but there is a clear intention to give to those who are objects.

Clarke v. *Clemmans* (4) and *In re Dutton* (5) depend on entirely different principles. In the former the Vice-Chancellor dealt with the gift as if it were a class gift, but clearly it was not a class gift. In the latter there was a good class gift, and it comes within the decision in *Kingsbury* v. *Walter.* (6) By the addition of other persons, not in the same relationship to the testator as the class of children named, this is not a class gift, but a gift of one eleventh share to each legatee.

The testator has made a mistake. He intended to give to six

(1) (1847) 7 Hare, 247.
(2) 2 Eden, 123; affirmed on appeal, 3 Bro. P. C. 246.
(3) L. R. 3 Ch. 301.
(4) 36 L. J. (Ch.) 171.
(5) [1893] W. N. 65.
(6) [1901] A. C. 187.

persons whom he names; five of them do not in fact exist, and why, because of that, are the first defendants or Mrs. Patrick to take more than the one eleventh share that was originally given to them? I submit that there is a failure of the gift of five of the eleven shares, and also of the legacies.

P. O. Lawrence, K.C., and *Clayton*, for the defendants the children of John Sharp Okey.

Hughes, K.C., and *H. B. Howard*, for the defendants the children of Samuel Frederick Okey by his second wife.

JOYCE J. I have no real doubt upon the question raised in this case. The testator was eighty-six years of age. He had a sister Elizabeth, who had had six children by her husband Samuel Frederick Okey, but at the date of the will and of the codicil only one of such children survived. There are two gifts—there is a gift "to the six children of the late Samuel Frederick Okey 200*l.* each," and the residue is given to a number of persons named "and the said six children of the said Samuel Frederick Okey in equal shares as tenants in common." Now, in my opinion, it does not admit of any serious argument, having regard to the terms of the codicil, that the children referred to in the will and codicil were other than the children of the testator's sister Elizabeth Okey by her husband Samuel Frederick Okey. But the testator has referred to the children as being six in number, when only one was living. That was a mistake or blunder, and it arose, or might have arisen, either from ignorance on the part of the testator or forgetfulness, or from some misunderstanding between him and the solicitor who drew this codicil.

Now if instead of there being six children of Samuel Frederick Okey by the lady who was the sister of the testator there had been seven or eight all living, then, according to the rule in *Garvey* v. *Hibbert* (1), which is well settled, each one of those seven or eight children, as the case might be, would have taken under each of these gifts; but instead of there being more children existing than the number of six mentioned, there were fewer, namely, only one. The rule is that, where there is a gift

(1) 19 Ves. 125.

JOYCE J. 1907 SHARP, *In re.* MADDISON *v.* GILL.

to children described as consisting of a specified number less than the number in existence at the date of the will, the Court can reject the specified number on the ground of mistake and hold that the others are entitled. That being the rule when the specified number is less than the number in existence, why cannot the Court, when there is a gift to children describing them as consisting of a specified number greater than the number in existence, reject the specified number on the same ground and say that only the children in existence are to be held to be entitled? I know of no reason why that should not be the rule to be applied, unless it be for the purpose of making the testator die intestate as to a great portion of his estate, which he certainly did not intend to do.

I hold, therefore, in this case that, where I find the six children of the late Samuel Frederick Okey mentioned, I must read the gift to them as if it had been a gift to the living children, or, in other words, the surviving child of the late Samuel Frederick Okey by this lady who is mentioned in the codicil. That is what I take to be the effect of the decision of the Court in *In re Dutton* (1), which is in principle very like this case, and it is also, in my opinion, the effect of the decision of Lord Langdale in the case of *Lord Selsey* v. *Lord Lake* (2), and it also is very like the case of *Clarke* v. *Clemmans*. (3) See also Underhill on Interpretation of Wills and Settlements, 2nd ed. p. 100. Therefore I hold in this case that there is only one child to take the legacy of 200*l*.; and that the residue is divisible in equal shares between John Gill, Edgar Gill, and the three children of Sarah Mitchell and Mrs. Patrick, the one surviving child of Samuel Frederick Okey by the lady who was the testator's sister.

Solicitors: *Dangerfield & Blythe, for T. & W. G. Maddison, Durham; Guscotte, Wadham & Co., for Goodwin & Cockerton, Bakewell; St. Barbe Sladen & Wing; Flux, Leadbitter & Neighbour, for G. W. Jennings, Bishop Auckland; Iliffe, Henley & Sweet, for T. M. Barron & Smith, Darlington.*

(1) [1893] W. N. 65. (2) 1 Beav. 146.
(3) 36 L. J. (Ch.) 171.

R. M.

SWINFEN EADY J.

1907

Dec. 10, 11, 19.

In re CRANE.

ADAMS *v.* CRANE.

[1907 C. 2347.]

Interest—Legacy—Bequest of Income to Legatee subject to Obligation of maintaining Infants.

A testator bequeathed the income of a trust legacy to his daughter-in-law during her widowhood, subject to the obligation of maintaining her deceased husband's children while minors and unmarried :—

Held, that the legacy did not carry interest from the testator's death.

Raven v. *Waite*, (1818) 1 Swans. 553, 559, followed.

Pitt v. *Fellows*, (1733) 1 Swans. 561, n.; *Leslie* v. *Leslie*, (1835) Ll. & G. t. Sugden, 1 ; and *In re Richards*, (1869) L. R. 8 Eq. 119, distinguished.

Originating Summons.

By a second codicil, dated May 10, 1906, C. H. Crane bequeathed 8000*l.* to Hazeldine, or other the trustee or trustees of the will of the testator's late son Clifford, to be held upon the trusts declared in Clifford's will of and concerning his residuary estate. The bequest was conditional on 300 10*l.* shares in the Crane Foundry Company, Limited, held by Hazeldine as executor and trustee of Clifford's will, being transferred to the testator, or to his executors within three months of his death, in consideration of 3000*l.*

The testator died on May 26, 1906, and the shares, which were paying 10 per cent., were duly transferred cum dividend to his executor within the three months. The 8000*l.* legacy was paid as follows, namely, 2500*l.* on November 14, 1906, and 5500*l.* on April 15, 1907, i.e., within twelve months from the testator's death, but without any interest from his death.

By his will, dated March 31, 1897, Clifford had devised and bequeathed his residuary estate to Hazeldine and another executor and trustee, who renounced and disclaimed, upon trust for sale and conversion, and directed them to pay the income to his wife during her widowhood, "but subject to the obligation of maintaining and educating thereout such of my children as shall for the time being be minors and shall not have been married but

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without liability to account so long as she shall maintain and educate them respectively to the satisfaction of my trustees." And after the death or remarriage of his wife the trustees were to stand possessed of the capital and income in trust for the children who being sons attained twenty-one or being daughters attained that age or married, with a substitutionary gift to the issue of children predeceasing Clifford, and an ultimate trust, on failure of children or issue attaining vested interests, for his wife absolutely.

Clifford had died on March 27, 1906, leaving a widow, who had not remarried, a son now aged ten, and a daughter aged four. His property practically consisted of the 300 shares.

This summons was issued to determine (inter alia) whether the 8000*l.* legacy carried interest from the testator's death.

Austen-Cartmell, for the executor and trustee of C. H. Crane's will.

Cann, for Hazeldine, the trustee of Clifford's will. If the income of a legacy is given for the maintenance of an infant legatee, the legacy carries interest from the testator's death: *Lambert* v. *Parker* (1); *Pett* v. *Fellows* (2); *Leslie* v. *Leslie* (3); *In re Richards* (4); *Chidgey* v. *Whitby*. (5) These decisions are based on an implied intention that maintenance is to run from the testator's death, which would be impossible if the interest or income only began a year later.

In the present case the income is given to the widow for her widowhood, subject to the obligation of maintaining the infants "thereout," and the principle of the above authorities applies. The question is purely one of intention. The testator knew the shares were producing 300*l.* a year, and that there was an obligation to maintain the infants out of that income. He gave the trustee 8000*l.* on condition that the shares were transferred for 3000*l.*, which would produce about 100*l.* a year. Can he have intended them to be maintained for the first year out of that 100*l.* and postpone their maintenance out of the legacy income

(1) (1815) Coop. G. 143.
(2) 1 Swans. 561, n.
(3) Ll. & G. t. Sugden, 1.
(4) L. R. 8 Eq. 119.
(5) [1872] W. N. 179; 41 L. J. (Ch.) 699.

to a year later? Is not the true inference that he intended the income of the entire 11,000*l.* to be at once available for maintenance in lieu of the 300*l.* a year?

Whitmore Richards, *E. R. Simpson*, and *E. S. Ford*, for various residuary legatees. The cases cited do not apply, as the infants are not legatees of the income, which is wholly given to the widow. Their right to maintenance does not make them objects of the testator's bounty: *Hammond* v. *Neame* (1); or make interest run from his death: *Raven* v. *Waite*. (2)

Cann, in reply. In *Hammond* v. *Neame* (1) the niece, the legatee of the income, had no children, and was under no legal obligation to provide for them when they came into existence. Their maintenance was merely the motive of the legacy. In *Raven* v. *Waite* (2) Sir Thomas Plumer M.R. construed the bequest as a gift to the mother, to enable her to maintain herself and her children, and held that the mother was the primary object of the testator's bounty. The children's maintenance was the motive of the legacy, but it was not imposed as a legal obligation. In the present case that obligation is directly imposed; the infants are pro tanto legatees, and interest, or at all events sufficient interest for maintenance, must run from the testator's death.

Cur. adv. vult.

Dec. 19. SWINFEN EADY J. (after stating the facts). Interest from the testator's death is claimed upon the 8000*l.* trust legacy upon the footing that, although not expressly given, an intention to give it in the shape of maintenance is fairly inferable.

The income, however, of this legacy is not given to any infants for their maintenance, but to an adult person, subject to the obligation on her part of maintaining and educating the infants, and I am not aware of any case in which, under such circumstances, interest has been allowed.

In *Leslie* v. *Leslie* (3)—which followed *Pett* v. *Fellows* (4)—interest from the death was allowed to infant grandnephews, because the fund was expressed to be given "for the use and support of the

(1) (1818) 1 Swans. 35.
(2) 1 Swans. 553, 559.
(3) Ll. & G. t. Sugden, 1.
(4) 1 Swans. 561, n.

SWINFEN EADY J.
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younger children." And so in *In re Richards* (1) interest was allowed from the death to certain infant grandnephews of the testator, to whom the testator was not in loco parentis, because the will empowered the executors to apply all or any part of the expectant share of any children, or the income thereof, towards his or her education, or otherwise for his or her benefit during minority.

In all these cases the beneficiaries were infants, and the ground upon which interest was allowed was that the testator had impliedly directed that interest should be payable from his death, otherwise there would not be any fund for maintenance.

This rule has not been extended to the case of adults.

In *Raven* v. *Waite* (2) a sum of 1600*l.* was bequeathed to trustees upon trust to apply the interest towards the maintenance and support of Frances Raven (the wife of testator's nephew John Raven, from whom she was living separate), and the maintenance, education, and bringing up of her children until the youngest should attain twenty-one, and after that event to pay the income to Frances Raven so long as she remained the wife or widow of her present husband, with a direction that, in case of her death or re-marriage before that event, the trustees should take the children under their sole care and management and apply the interest towards the maintenance, education, and bringing up of the children until the youngest should attain twenty-one. The bill was filed by Frances Raven to establish her claim to interest on the 1600*l.* from the testator's death; but Sir Thomas Plumer M.R. dismissed the bill. He said that all the cases in which an exception had been admitted to the rule against allowing interest before one year from testator's death had been cases of infants; that no case had been produced in which the exception ever was extended to a legacy in favour of an adult, though cases innumerable must have occurred of legacies to persons aged and decrepit, objects of the testator's bounty during his life. He added: "It is then insisted, that this is a provision for the joint benefit of an adult parent and her infant children; and that the exception in favour of the infants must prevail. But the gift here is to the mother, to

(1) L. R. 8 Eq. 119. (2) 1 Swans. 553, 559.

enable her to maintain herself and her children, and the legacy is payable to her during her life; after her death, indeed, the trustees are to apply it for the maintenance of the children, but the mother is the primary object of the testator's bounty. Such a gift cannot form an exception to the rule."

I therefore decide that the legacy of 8000*l.* does not carry interest for the period between the testator's death and the dates upon which the instalments of the legacy were paid.

Solicitors: *Taylor, Hoare & Pilcher, for Dent & Adams, Wolverhampton; Woodcock Ryland & Parker, for Waterhouse & Son, Wolverhampton; Shelton, Walker & Bikker; Robins, Hay, Waters & Hay.*

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[1907 B. 4235.]

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[1907 B. 3880.]

Will—Condition—Forfeiture—Entering Naval or Military Services—Invalidity—Public Policy.

A condition divesting the interest of a devisee or legatee if he enters into the naval or military services of the country is void as against public policy.

ORIGINATING SUMMONSES.

By his will, dated February 8, 1894, a testator devised all his real estate to his wife for her life, and after her death he devised his Staffordshire estates to his nephew Herbert for life, "provided that he does not enter into the naval or military services of the country," with remainder to his children in fee simple as tenants in common, with a proviso that if any child died under twenty-one without leaving issue his share should go to the

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other children. But if his nephew Herbert should "enter into the naval or military services of the country," then the testator devised the Staffordshire estates to his nephew Francis.

The testator bequeathed his residuary personal estate to his trustees upon trust to pay the income to his wife for life, and after her death to stand possessed thereof in trust for his nephews Cyril and Herbert in equal shares, but if either of them should "enter into the naval or military services of the country," the testator directed the share of either of them "so entering into the naval or military services of the country" to be held in trust for William Sanford Eaton.

The testator died on March 10, 1895.

William Sanford Eaton died intestate on March 20, 1902.

On May 18, 1904, Herbert assigned his interest to the Reversionary and General Securities Company, Limited, hereinafter called the Reversionary Company.

On August 13, 1907, the testator's widow died, and the nephews' interests fell into possession.

Herbert was aged thirty, and had one child. Cyril was twenty-six, and unmarried. They had not entered the naval or military services.

These summonses were issued to determine whether the forfeiture conditions were valid, or whether the gifts were absolute.

Andrewes-Uthwatt, for the Reversionary Company. The conditions are void as contrary to public policy. The King's subjects, by reason of their allegiance, are bound to serve the King in his wars: 11 Hen. 7, c. 1, preamble (1495); *Calvin's Case*. (1) The oath of allegiance is now only required in certain special cases: Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), ss. 2, 9; but all subjects are bound to their allegiance quite apart from any oath: Coke's 2nd Inst. 121; Stephen's Commentaries, 14th ed. vol. ii. p. 435. At the present day the naval and military services are practically voluntary; but the power of impressment for the navy still exists: *Rex* v. *Tubbs* (2); and the Militia (Ballot Suspension) Act, 1865 (28 & 29 Vict. c. 46), is only kept in force from year to year by the annual Expiring Laws Continuance Act, and even

(1) (1608) 7 Rep. 1a, 7b. (2) (1776) 2 Cowp. 512.

during that suspension the ballot may be revived at any moment by Order in Council.

Conditions like these would tend to prevent a man obeying the call to a public duty, and are therefore void. It is surely against public policy that any one "should (in some period of great emergency) have to choose whether he will save his country and lose his estate, or save his estate by declining the public service. . . . . The law looks not to the probability of public mischief occurring in the particular instance, but to the general tendency of the disposition. . . . . Individuals ought not to be allowed to dispose of their property in any manner which furnishes a motive to conduct, in relation to acts of State, independent of a sense of right and duty. . . . . To do it in a manner which furnishes motives for conduct, independent of a sense of public duty, is a disposal tending to prejudice the living, and is such as the law will not uphold": *Egerton* v. *Earl Brownlow*. (1) As the conditions are conditions subsequent, their avoidance makes the gifts absolute.

Ashton Cross, for Cyril, adopted the same argument. He also appeared for Francis, but submitted on his behalf to be bound by the decision as to the residuary personalty.

Scott Thompson, for William Sanford Eaton's administratrix. These conditions would probably have been contrary to public policy in 1608, when *Calvin's Case* (2) was decided, and when service in the navy or army was looked upon as a public duty. At the present day there is no such public duty. Impressment for the navy was mainly confined to seafaring men, and if it still technically exists it is practically obsolete. If the militia ballot were enforced, the person whose name was drawn could provide a substitute. Personal service is not requisite. The will must be construed with reference to the state of things existing at the present day. The naval and military services are at present purely voluntary, and the forfeiture conditions are really directed against voluntarily entering those services. Compulsory service under impressment or ballot, or under any future compulsory service Act, would not be a breach of the conditions. The

(1) (1853) 4 H. L. C. 1, 152, 196, 201, 203.
(2) 7 Rep. 1a, 7b.

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conditions do not tend to prevent the performance of any public duty, and are therefore not contrary to public policy.

H. J. H. Mackay, for the trustees, referred to *In re Dickson's Trust.* (1)

Cur. adv. vult.

Dec. 21. SWINFEN EADY J. (after stating the facts). The conditions to which I have referred are conditions subsequent, the object of the conditions being to determine and divest (upon the happening of the event specified) estates or interests antecedently vested. If, therefore, the condition be void as being contrary to public policy, the gift will be absolute both as regards the real and personal estate. It is laid down in Sheppard's Touchstone, vol. i. p. 132: "If the matter of the condition tend to provoke or further the doing of some unlawful act, or to restrain or forbid a man the doing of his duty, the condition for the most part is void. . . . . And hence also it is that such conditions as are against the liberty of law, as that a man shall not marry, or the like, are void. And hence also such as are against the public good."

When questions arise as to conditions or provisions being void as being against the public good or against public policy, great caution is necessary in considering them; at different times very different views have been entertained as to what is injurious to the public. Thus, in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (2), Lord Macnaghten stated that in the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy, and therefore void. But since that time the rule had been relaxed so far as the exigencies of trade for the time being required. If, however, it be clearly established that the condition is against public policy, it is certainly void.

In *Richardson* v. *Mellish* (3) Best C.J. held that, in considering whether an agreement was illegal as being against public policy, if the question were a doubtful matter of policy the plaintiff would not be prevented from recovering, as doubtful questions

(1) (1850) 1 Sim. (N.S.) 37. (2) [1894] A. C. 535, 564.
(3) (1824) 2 Bing. 229, 242, 252.

of policy must be settled by the Legislature; but that if it be clearly and unquestionably established that an agreement is contrary to public policy, a plaintiff cannot recover upon it. Burrough J. took the same view, protesting, however, against arguing too strongly upon public policy—saying that it is a very unruly horse, and when once you get astride it you never know where it will carry you.

In my opinion, however, there can be few, if any, provisions more against the public good and the welfare of the State than one tending to deter persons from entering the naval or military services of the country. Such a provision strikes at the very security of the State, which must depend for its protection against external enemies on the armed forces of the Crown, both naval and military; and the law looks, not to the probability of public mischief occurring in the particular instance, but to the general tendency of the disposition. If conditions imposed be really and in principle against the public good, and clearly and directly opposed to the public welfare, they are certainly void. "Salus reipublicæ suprema lex." Although the raising or keeping of a standing army within the United Kingdom in time of peace, unless with the consent of Parliament, is against law, it has for many years past been annually adjudged necessary by the Legislature to maintain even in time of peace a standing body of troops under the command of the Crown. The Army (Annual) Act recites that it is adjudged necessary by His Majesty and this present Parliament that a body of forces should be continued for the safety of the United Kingdom and the defence of the possessions of His Majesty's Crown, and that it is also judged necessary for the safety of the United Kingdom and the defence of the possessions of this realm that a body of Royal Marine forces should be employed in His Majesty's fleet and naval service. (1) It is manifest that any condition divesting property on a devisee or legatee becoming a member of those forces which Parliament considers necessary for

(1) The Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), following the language of older Acts, recites that "it is expedient to amend the law relating to the government of the Navy, whereon, under the good Providence of God, the wealth, safety, and strength of the Kingdom chiefly depend."

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the safety of the kingdom has a tendency to deter persons from entering those forces, and is, therefore, against the welfare of, and injurious to, the community, and absolutely void. I therefore determine that in each case the devisee or legatee takes an absolute interest, not liable to be divested on his entering into the naval or military services of the country.

Solicitors: *James Alfred Doudney; Flux, Thompson & Quarrell; Williamson, Hill & Co., for J. & F. E. Burton, Castle Donington; Geare & Willis, for J. & W. J. Drewry & Newbold, Burton-on-Trent.*

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ATTORNEY-GENERAL (ON THE RELATION OF THE RHONDDA URBAN DISTRICT COUNCIL) AND THE RHONDDA URBAN DISTRICT COUNCIL *v.* PONTYPRIDD WATERWORKS COMPANY.

[1906 R. 1503.]

Water Supply—Local Government—Urban Authority—Waterworks Company—Special Act—Provisions for Protection of Urban Authority—Action by Urban Authority to enforce—Joinder of Attorney-General—Necessity for—Amendment—Terms—Pontypridd Waterworks Act, 1892 (55 & 56 *Vict. c. cviii.*), *s.* 4.

By the Pontypridd Waterworks Act, 1892 (55 & 56 Vict. c. cviii.), s. 4, the defendant company were authorized to make and maintain a reservoir and certain filter beds, service tanks, conduits or lines of pipes and other works in the county of Glamorgan therein mentioned. Sect. 10 provided that if the works authorized were not completed within the time thereby limited the powers of the defendant company should cease, "Provided that for the protection of the Pontypridd and Ystradyfodwg Local Boards . . . . the following provisions shall have effect (namely)"; and then followed provisions imposing certain obligations upon the defendant company with reference to the quantity and quality of the water to be supplied to the districts of the two local boards.

On September 13, 1906, the plaintiff council, who were the successors in interest of the Ystradyfodwg Local Board, commenced an action in their own name against the defendant company to enforce by mandatory injunction the provisions of s. 10. The defendant company by their defence alleged (inter alia) that they would object that the plaintiff council's statement of claim disclosed no cause of action. On November 6, 1907, after notice of trial had been given, the plaintiff council obtained an order giving them liberty to amend their writ and

statement of claim by adding the Attorney-General as a co-plaintiff on their relation. The order provided that "all questions as to the terms upon which such amendments ought to be allowed be left to the judge at the trial of this action, when the defendants are to be at liberty to raise such preliminary objections as they may think fit." The Attorney-General was accordingly added as a co-plaintiff:—

Held, that s. 10 of the defendant company's Act did not confer upon the plaintiff council any statutory power to sue in their own name, and that the only person who could sue was the Attorney-General.

Devonport Corporation v. *Tozer*, [1903] 1 Ch. 759, followed.

Held, also, that the liberty given to amend by the order of November 6 must be upon the terms that the plaintiff council should pay to the defendant company their costs of the action up to and including that order, and that the Attorney-General should only be entitled to such relief as he could have claimed if the action had been commenced at the date on which he was added as a party.

Ayscough v. *Bullar*, (1889) 41 Ch. D. 341, applied.

WITNESS ACTION.

By the Pontypridd Waterworks Act, 1892 (55 & 56 Vict. c. cviii.), s. 4, the defendant company were authorized to make and maintain in the lines and situations and upon the lands shewn on the deposited plans, and according to the levels shewn on the deposited sections, the reservoir, filter beds, service tanks, conduits or lines of pipes, and other works in the county of Glamorgan therein mentioned.

Sect. 10 of the Act was as follows:—

"If the works authorized by this Act be not completed within five years from the passing of this Act then on the expiration of that period the powers by this Act granted to the company for executing the same or in relation thereto shall cease except as to so much thereof as is then completed but nothing in this section shall restrict the company from extending their works mains and pipes from time to time whenever it shall be necessary for the purpose of increasing or distributing the supply of water within their limits of supply.

"Provided that for the protection of the Pontypridd and Ystradyfodwg Local Boards (hereinafter called the local boards) the following provisions shall have effect (namely):—

"(A) The company shall construct and complete within fifteen months from the passing of this Act the filter beds and service tank (No. 2) hereinbefore described and also shall construct and

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complete the other filter beds authorized by this Act within four years from the passing of this Act;

"(B) The service tanks to all filter beds authorized by this Act shall be constructed to contain not less than 100,000 gallons of filtered water each and such service tanks shall be at all times open to inspection by the local boards or their officers;

"(C) The existing Rhiw tank shall be constantly supplied with filtered water so that there shall always be at least one foot of water in the said tank above the inlet to the pipe supplying the town of Pontypridd therefrom. A proper self-closing valve shall be provided on the inlet to the said tank to prevent waste of the water from the Maerdy service tank by overflowing from the Rhiw tank;

"(D) The company shall within eighteen months from the passing of this Act lay down and complete a separate and independent line of mains not less than five inches in diameter and connect the same with their existing Maerdy service tank so as to be in a position to supply every portion of the districts of Williamstown Edmondstown and Penygraig within the company's limits and shall keep the said mains charged with water at all times under constant pressure;

"(E) The company shall keep their mains throughout the districts of the local boards charged with water at all times under constant pressure and shall provide such means as will best enable them to do so;

"(F) The company shall carry out the works authorized by this Act so as to give in the first instance a storage capacity of not less than 160,000,000 gallons of water and shall further increase their storage capacity if found necessary so as to bring it up to 200,000,000 gallons of water;

"(G) After completion of the filter beds and service tank (No. 2) hereinbefore referred to all water not supplied direct from springs within the districts of the local boards shall be properly filtered before the same shall be allowed to enter the mains."

The plaintiff council were the successors in interest of the Ystradyfodwg Local Board named in the said Act, and all the

rights of the last-mentioned board had become and were vested in the plaintiff council under and by virtue of the Local Government Act, 1894, and the district of the said local board was now the district of the plaintiff council.

On September 13, 1906, the plaintiff council issued their writ in the present action, claiming—(1.) a declaration that the defendant company were bound by the Pontypridd Waterworks Act, 1892, to keep their mains throughout the plaintiff council's district charged with water at all times under constant pressure, and that the defendant company might be ordered forthwith to provide such means as would enable them to do so; and (2.) an injunction restraining the defendant company, their servants, agents, and workmen from allowing any water not supplied direct from springs within the district of the plaintiff council or of the Pontypridd Urban District Council from entering their mains without being properly filtered.

The plaintiff council by their statement of claim alleged that the defendant company had committed the following breaches of their Act—namely, (1.) they had not kept the mains mentioned in s. 10, clause (D), charged with water at all times under constant pressure, but had on many occasions during long periods continuously failed to keep the said mains so charged; (2.) they had not kept their mains throughout the district of the plaintiff council charged with water at all times under constant pressure, and they had not provided such means as would best enable them to do so, but had on many occasions during long periods failed to keep their last-mentioned mains so charged; (3.) they had caused water not supplied direct from springs within the districts referred to in clause (G) to enter the mains referred to in the last-mentioned clause without being previously or at all filtered, so that the same had reached the consumers in an unfiltered or insufficiently filtered condition. The plaintiff council further alleged that the effect of these breaches on the part of the defendant company had been that many inhabitants of the plaintiff council's district entitled to a sufficient supply of pure water by the defendant company had at intervals been deprived during long periods of any supply (and that other such inhabitants had received water in an unfiltered

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or insufficiently filtered condition). The plaintiff council also alleged that they had repeatedly complained to the defendant company of such breaches, and requested them to remedy the same and to perform the said provisions of the Act, but that the defendant company had failed so to do.

The defendant company by their defence alleged (inter alia) that they would object that the statement of claim disclosed no cause of action.

On November 6, 1907, after notice of trial had been given, the plaintiff council obtained an order giving them liberty to amend their writ and statement of claim by adding the Attorney-General as a co-plaintiff in the action on their relation. The order provided that "all questions as to the terms upon which such amendments ought to be allowed be left to the judge at the trial of this action, when the defendants are to be at liberty to raise such preliminary objections as they may think fit." In pursuance of this order the writ and statement of claim were on November 9, 1907, amended by adding the Attorney-General as a co-plaintiff on the relation of the plaintiff council.

The action now came on for trial.

Upjohn, K.C., H. Terrell, K.C., and *Dunham,* for the plaintiffs, stated the facts.

Warmington, K.C., Rowland Rowlands, and *Trevor Lewis,* for the defendant company. We take the preliminary objection that the action as originally constituted was not maintainable. The plaintiff council had no locus standi to bring the present action. At the date when it was commenced no power to sue in their own name was vested in the plaintiff council either by the defendant company's special Act, the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), or the Public Health Act, 1875 (38 & 39 Vict. c. 55). To enable a local authority to sue in their own name one of two things is essential, either the action must be brought in respect of property vested in them in their corporate capacity, or must be brought by them in pursuance of some express statutory authority empowering them to sue in their own name. Neither of those essentials is to be found in the present case. The proper plaintiff was therefore the Attorney-General:

Attorney-General v. *Ashborne Recreation Ground Co.* (1); *Devonport Corporation* v. *Tozer.* (2) The Public Health Act, 1875, one of the main objects of which was to enable proceedings to be taken for the abatement of nuisances, by s. 107 provides that "any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, cause any proceedings to be taken against any person in any superior Court of Law or Equity to enforce the abatement or prohibition of any nuisance under this Act, or for the recovery of any penalties from or for the punishment of any persons offending against the provisions of this Act relating to nuisances . . . ."

[WARRINGTON J. The words of that section would be satisfied by the local authority acting as relators.]

Yes. Under that section the local authority are entitled to cause proceedings to be taken, but not to take them themselves in their own name. The provision in s. 10 of the special Act as to the protection of the local boards does not amount to a contract between them and the defendant company: *Davis & Sons* v. *Taff Vale Ry. Co.* (3) To enable the plaintiff council to initiate proceedings in their own name special powers must be found in the Act authorizing them to do so, but there are no such powers here.

Then, as to the terms on which the amendment joining the Attorney-General ought to be allowed, those are stated by the Court of Appeal in *Ayscough* v. *Bullar* (4), namely, that the plaintiff council must pay the defendant company's costs up to and including the order giving them liberty to amend by adding the Attorney-General as a co-plaintiff, and the Attorney-General must take up the position as commencing the action on the date on which he was made a party.

Upjohn, K.C., H. Terrell, K.C., and *Dunham,* for the plaintiffs. The plaintiff council had a perfectly good cause of action at the date of the issue of the writ, and the Attorney-General was not a necessary party, but was merely added ex abundanti cautelâ. The insertion in s. 10 of the special Act of the words "Provided that for the protection of" the local

(1) [1903] 1 Ch. 101.
(2) [1903] 1 Ch. 759.
(3) [1895] A. C. 542.
(4) 41 Ch. D. 341, 346.

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boards, &c., was intended by Parliament to confer upon them the power to enforce the rights given to them by that section. The case therefore falls within the exception pointed out by the judges in *Devonport Corporation* v. *Tozer*. (1) The section constituted the plaintiff council a public authority ad hoc to enforce the execution of the works therein mentioned for the benefit of a limited section of the public, not of the public at large. The clauses of that section, which are mandatory in their nature, all have reference to public health. The local boards were, and the plaintiff council now are, a health authority. Under the Public Health Act, 1875, all local authorities are health authorities (s. 13) and potential water authorities (s. 51). Under these circumstances s. 10 of the special Act makes mandatory nearly all the works mentioned in the enabling section of the Act. The effect of this is to give to the plaintiff council, as the health authority, power to enforce and to compel the performance of the provisions of s. 10, and further to give them a right of action independent of the Attorney-General.

[WARRINGTON J. Do you say that s. 10 is not for the protection of the public, and therefore that the Attorney-General cannot sue?]

It is not necessary for us to contend that, because the Attorney-General as representing the Crown can always maintain an information to compel corporations to perform their statutory obligations, whether such obligations are affirmative or negative: *Attorney-General* v. *London and North Western Ry. Co.* (2) The Attorney-General does not bring an action by virtue of his being a party to a parliamentary bargain. Sect. 107 of the Public Health Act, 1875, upon which the defendant company rely, leaves the question open as to the persons in whose name the proceedings there mentioned are to be instituted. Sect. 10 of the special Act, it is submitted, gives the plaintiff council an implied right of action. The point raised in the present case was not discussed by Buckley J. in *Attorney-General* v. *Ashborne Recreation Ground Co.* (3) *Devonport Corporation* v. *Tozer* (1) does not apply to the present case. The plaintiff council here are not, as the

(1) [1903] 1 Ch. 759. (2) [1900] 1 Q. B. 78.
(3) [1903] 1 Ch. 101.

plaintiffs in that case were, putting in suit a public wrong, but are putting in suit a parliamentary bargain to which the plaintiff council were a party.

[WARRINGTON J. Do you say that the plaintiff council could recover damages for the breach by the defendant company of their statutory obligations?]

No, it was not contemplated by Parliament that they should do so. What Parliament did contemplate was that the plaintiff council might apply to the Court and obtain a mandatory order to enforce the performance of those obligations. It would always have been competent to the plaintiff council to have gone to the Attorney-General and said, "Here is a water authority in our district who are not performing their duties, with the result that injury to public health is thereby occasioned in a portion of our district." It is submitted that the plaintiff council are here pursuing the special statutory remedies given them by s. 10 of the Act. The effect of provisions similar to those contained in that section are discussed in *Countess of Rothes* v. *Kirkcaldy and Dysart Waterworks Commissioners* (1) and *Davis & Sons* v. *Taff Vale Ry. Co.* (2) What effect can be given to the words "Provided that for the protection of" the local boards "the following provisions shall have effect," &c., unless the plaintiff council are thereby empowered to sue in their own name?

[WARRINGTON J. Why are not the local section of the public, whose interests are involved in this enactment, protected by the fact that the enactment is made and can be enforced by the Attorney-General?]

That would not be giving any effect to the words. In construing a document the Court is bound to give, if possible, effect to every word of it. It is submitted that Parliament intended by the section to impose certain obligations on the defendant company for the benefit of the persons living in the districts of the local boards, and to constitute those local boards the authorities for enforcing compliance with those obligations without incurring the delay and expense of going to the Attorney-General. It is immaterial that they are obligations for the breach of which damages cannot be recovered. Parliament intended that these

(1) (1882) 7 App. Cas. 694, 707.

(2) [1895] A. C. 542, 549, 552.

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obligations should be specifically performed, and that the local boards alone should be the authorities to enforce their performance by action. The provisions of the section are obviously for the benefit of a section of the public. The plaintiff council, as a health authority, suffer special damage by reason of the non-performance of those provisions.

If the Court is against the plaintiff council on this first point, it is submitted that the case is one which falls within Order XVI., r. 2, and is not one in which the Court will impose any terms as to the costs of the amendment. This is an entirely different case from *Ayscough* v. *Bullar* (1), where a person having a different cause of action was added as a co-plaintiff. Here the cause of action is the same, and, whether the action is brought by the plaintiff council or by the Attorney-General, the persons who will ultimately benefit by it are the persons for whose benefit s. 10 was enacted.

[WARRINGTON J. Assuming that you are wrong on the first point, what would have happened if you had gone to trial without amendment?]

The Court would, it is submitted, have allowed the case to stand over, in order that an opportunity might be afforded the plaintiff council of joining the Attorney-General as a co-plaintiff, as was done by the Court of Appeal in *Boyce* v. *Paddington Borough Council.* (2) The present case, it is submitted, falls within the reasoning of Kekewich J. in *Showell* v. *Winkup* (3), and not within *Ayscough* v. *Bullar.* (1) The plaintiff council ought not, therefore, to be put upon any terms as to the costs. If, however, the Court is of opinion that the plaintiff council ought to pay the defendant company's costs, those costs, it is submitted, ought to be limited to the costs of the application to join the Attorney-General.

Warmington, K.C., was not called upon to reply.

WARRINGTON J. This was an action brought by the Rhondda Urban District Council in their own name, and suing on their own behalf, against the Pontypridd Waterworks Company. The

(1) 41 Ch. D. 341. (2) [1903] 2 Ch. 556, 561.
(3) (1889) 60 L. T. 389, 391.

statement of claim alleges that by the Pontypridd Waterworks Act of 1892 certain provisions relating to the supply of water to two districts, one of which is now the district of the plaintiff council, have not been complied with, and the plaintiff council sought a mandatory injunction to compel the company to comply with those statutory provisions. To that claim the defendant company put in a defence, in which they stated that they would object that the statement of claim disclosed no cause of action. They, therefore, at the earliest possible moment gave notice to the plaintiff council that, even if the allegations in the statement of claim were proved, it disclosed no cause of action; that is to say, that there was a legal objection to the action. In order, apparently, to meet that objection the plaintiff council on October 23, 1907—more than a year after the commencement of the action, and when the action was ready for trial, and when in fact notice of trial had been given—applied for leave to amend by adding the Attorney-General as a co-plaintiff. On November 6, 1907, liberty to amend was given, but the order giving that liberty contained this provision: "It is ordered that all questions as to the terms upon which such amendments ought to be allowed be left to the judge at the trial of this action, when the defendants are to be at liberty to raise such preliminary objections as they may think fit." The defendant company have now, at the close of the opening of the plaintiffs' case, and before evidence has been called, taken the objection that the action as originally constituted was unfounded, and that the statement of claim disclosed no cause of action on the part of the plaintiff council against them. That is the contention with which I am required to deal. I have, therefore, in the first instance to consider the action in its original form, which was that of an action liable to be dismissed on the ground that the allegations in the statement of claim disclosed no cause of action.

Now the facts are these. The plaintiff council are the urban authority under the Public Health Acts, and exercising the powers conferred, and discharging the duties imposed upon local authorities, by the Public Health Act, 1875. The defendant company are a water company supplying certain districts with water, including, amongst those districts, the district of the plaintiff council. The

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plaintiff council are the successors under the Local Government Act, 1894, of a local body which were called the Ystradyfodwg Local Board. Sect. 10 of the defendant company's Act of 1892 provided that if the works authorized were not completed within the time thereby limited the powers of the company should cease, "Provided that for the protection of the Pontypridd and Ystradyfodwg Local Boards (hereinafter called the local boards) the following provisions shall have effect (namely)"; and then there followed certain provisions, which I need not read in detail, imposing obligations upon the defendant company with reference to the quantity and quality of water to be supplied to the districts of those local boards. The present action, as I have stated, is brought by the plaintiff council to enforce those provisions. The objection taken by the defendant company is that those provisions are for the benefit of the public—that is, for the section of the public which inhabits those districts—and that the proper person, and the only person, to sue is the Attorney-General.

The only authority to which I think I need refer is *Devonport Corporation* v. *Tozer*. (1) There the plaintiffs were the corporation of Devonport—that is to say, they were the persons who occupied the same position in reference to a borough as the plaintiff council here occupy in reference to their district. They had made certain by-laws with regard to new streets which they alleged the defendants were infringing, and they brought an action for an injunction to restrain them from continuing so to infringe them. Objection was taken, as here, that the action was not maintainable in the absence of the Attorney-General, and effect was given to that objection by the Court of Appeal. I do not propose to read the judgments of every member of the Court of Appeal; they all agreed, but the fullest statement of the law applicable to the case is made by Romer L.J., and I propose to read it. He says (2): "It is to be borne in mind that the plaintiffs here have no proprietary rights which are being interfered with by what is being done by the defendants. The plaintiffs, no doubt, have powers conferred upon them to make by-laws, but that alone gives them no special rights over other bodies, or other members of the public, as to initiating

(1) [1903] 1 Ch. 759. (2) [1903] 1 Ch. 764.

proceedings to enforce those by-laws. Such powers as the plaintiffs, the public body, have to enforce by by-laws, must be conferred upon them by special powers given to them by statute, and, in fact, you do find special powers here given; and,"—and this is the important part—"except in so far as special powers are given, they have no inherent right to take proceedings. And I think it is rather to be deprecated that public bodies such as the plaintiffs in this case should be at liberty, without the leave of the Attorney-General, to commence expensive proceedings, such as these, at their own will. The fact that you do find a special power given to a public body, such as the plaintiffs, to initiate proceedings at law, or in equity, in certain special cases, is an additional proof that the Legislature never contemplated that, apart from special legislative permission, they should have a right to take any proceedings they might think fit for the purpose of enforcing the by-laws, apart from the special power conferred upon them by statute." Now the present case is not one of enforcing by-laws, but it is one exactly analogous to that, because, after all, by-laws made under statute are rules which have a statutory effect. This is an action brought to enforce the provisions of a statute. To a certain extent, no doubt, the plaintiff council, as the urban district authority and as the sanitary authority of their district, are interested in the performance by the defendant company of their statutory duties, just as any member of the public is interested; but have they, either by statute or otherwise, any such interest as they can enforce by action? In my opinion they have not. To go back, without reading it, to what Romer L.J. has laid down, they had no proprietary right; that is quite clear. Then is there any special permission conferred upon them by statute? That is the real question which I have to determine. The contention of the plaintiff council is that because the Act of Parliament which imposes the obligation begins by stating that the particular provisions are inserted for the protection of the local boards, that that gives them the right to commence an action in their own name, and that that is in fact the special legislative permission referred to by Romer L.J. in his judgment as sufficient to take the case out of the ordinary rule. In my opinion that is

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not so. I think those words only mean this: that, those local boards representing as they did a certain section of the public, these provisions were inserted for the protection of that section of the public, and the protection which that section of the public got was the fact that the provisions were inserted in the Act of Parliament. It was merely an introduction in a narrative form, one might almost say, stating how it came about that those particular provisions were inserted. They were inserted in order that the limited branch of the public might have the special protection which was conferred by the insertion of those provisions. It seems to me, therefore, that the statement of claim as originally framed disclosed no cause of action, and that the defendant company, therefore, were on November 6, 1907, entitled to say that the action so constituted ought to be dismissed on that ground.

Then, application being made to amend, leave was given to amend, and the further question I have now to determine is on what terms that leave ought to be given. I have got an action with which I have now to deal as if I were dealing with an application for leave to amend, an action which, on the date when the application for leave to amend comes before the Court, is liable to be dismissed with costs, on the ground that the plaintiff council, who have brought the action, have no right to sue. Now what ought I to do? I think I ought to follow the directions given me by the Court of Appeal in *Ayscough* v. *Bullar*. (1) In that case an action had been brought by A. to enforce a particular covenant. A. was doubtful whether she would not have failed for a particular reason affecting herself or the property to which she was entitled, and accordingly before the action was tried, in order to make the matter safe, she applied for leave to join another person against whom no such defence could be raised for the purpose of enforcing the same covenant. That application came on to be heard before the trial, and therefore the judges of the Court of Appeal did not have to consider, and did not in fact consider, whether A., the original plaintiff, would or would not fail in the action, and accordingly they made this order as to the terms upon which leave to make the amendment

(1) 41 Ch. D. 341.

should be given. They said this, in the words of Cotton L.J. (1): "We think that allowing the amendment to be made must be upon the terms that if on the trial it appears that the first plaintiff, Miss Ayscough, is not entitled to maintain the action, and that Captain Ayscough is so entitled, she must pay the costs of the action up to the time of the joinder of Captain Ayscough; and further, that he will only be entitled to such relief as he could have claimed if the action had commenced at the time of his joinder as plaintiff." Those were the terms which the Court of Appeal thought were just in the case before them. Now it appears to me that I have before me, for all practical purposes, exactly the case which they had before them, with this difference, that I have now determined that the action in its original form was not maintainable, and therefore what was conditional in the order of the Court of Appeal in that case need not be conditional in the case I have before me. It is said that it is a mere question who shall obtain the relief in the present case, that the same relief would be obtained if the Attorney-General succeeded as would be obtained if the plaintiff counsel had brought the action; and so it was in *Ayscough* v. *Bullar*. (2) The covenant which was to be enforced was the same whether it was A. or B. who commenced the action, and the enforcing of the covenant by B. would give A. exactly the same benefit as A. would have obtained if she enforced it by her own action. It seems to me, therefore, that I have exactly the case which was before the Court in *Ayscough* v. *Bullar*. (2) I have to consider not only the question as it affects the plaintiff council, but also what is just to the defendant company, as was pointed out in the case before the Court of Appeal to which I have referred. I think I can only do justice to the defendant company against whom the action—which was an unfounded action; that is to say, one which could not succeed—has been brought by ordering that the plaintiff council pay the costs of the action up to and including November 6, 1907, in any event. I do not mean that there should be a separate taxation now, but that the costs of the action up to and including November 6, which will cover the application to amend, will be the defendant company's costs in any event; and, further, that the

(1) 41 Ch. D. 346. (2) 41 Ch. D. 341.

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Attorney-General is only to be entitled to such relief as he could have claimed if the action had been commenced on November 9, 1907, the date upon which he was added as a co-plaintiff by amendment.

The hearing was then proceeded with, and ultimately the action was compromised.

Solicitors: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd*; *Wrentmore & Son, for Frank James & Sons, Cardiff.*

W. I. C.

WARRINGTON J.
1908
Jan. 14.

In re BARNETT.
DAWES *v.* IXER.

[1900 B. 2420.]

Power—Execution—"Writing or Writings"—"Appointment made by Will"—Testamentary Document not provable as Will—Validity—Wills Act, 1837 (1 *Vict. c.* 26), *ss.* 1, 9, 10.

Mrs. Barnett assigned a policy of assurance on her own life to trustees by a settlement which contained a proviso that it should be lawful for her at any time during her life "by any deed or deeds writing or writings with or without power of revocation to be by her duly executed in the presence of two or more credible witnesses to revoke all any or either of the" provisions of the settlement, and to appoint other trusts in their place. She subsequently signed a document by which she did not in terms revoke any of the provisions of the settlement, but purported to make certain dispositions of (inter alia) the property the subject of the settlement in testamentary form. This document was signed by her in the presence of two credible witnesses, but, inasmuch as her signature was not placed at the foot or end thereof, it could not be admitted to probate as a will. The question now raised was whether the document operated as an exercise of the power of appointment:—

Held, that the document was a "writing in the nature of a will in exercise of a power," and therefore by s. 1 of the Wills Act, 1837, a "will" within the meaning of that statute; it was therefore an "appointment made by will" within the first sentence of s. 10, and, inasmuch as it was not executed as a will in accordance with s. 9, it was invalid as an execution of the power.

In re Broad, [1901] 2 Ch. 86, not followed.

By a settlement of September 20, 1838, Mrs. Barnett, a widow, assigned a policy of assurance on her own life for 3000*l.*, and all

sums which might be received by way of bonus or addition to the sums thereby assured, to trustees upon certain trusts which are immaterial for the purposes of this report; and the settlement contained the following proviso: "Provided always nevertheless and it is hereby declared and agreed that it shall and may be lawful for the said Ann Barnett at any time or times during her life by any deed or deeds writing or writings with or without power of revocation to be by her duly executed in the presence of two or more credible witnesses to revoke all any or either of the gifts directions limitations and appointments hereinbefore contained of or relating to the moneys and premises by these presents expressed or intended to be assigned and to give direct limit and appoint such other disposition use or uses trust or trusts concerning the same moneys and premises or any part thereof as she the said Ann Barnett shall think proper hereafter to express by such deed or deeds writing or writings these presents or anything herein contained to the contrary notwithstanding."

On August 26, 1846, Mrs. Barnett signed a document by which, without in terms revoking the provisions of the settlement, she purported to make certain dispositions of the property thereby settled. The document commenced with the following words: "The life assurance for three thousand pounds at my death I wish my two sons C. J. and H. G. Barnett to receive the money," and then she gave directions as to what they were to do with it. She proceeded to deal with other property not subject to the settlement as follows: "The chains glass watch seals gold rings and gold buckle I generally wear I leave Miss Dekin and all my clothes. I leave out of my money in the English funds one thousand pounds to my son Edward and one thousand pounds to my son William, the principal not to be touched without my son Henry's consent the remainder in the English funds to my son H. G. Barnett let it be what it may. My funeral expenses and all my debts to be paid out of the money at my bankers. I wish ten pounds to be given to my own maid and five pounds to each of my servants for mourning—after paying the above the remainder at my bankers to be equally divided between my sons C. J. and H. G. Barnett." She made similar dispositions of other properties,

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and concluded thus: "Whatever bonus or sum of money may be added to the policy of assurance my wish is should be given as follows"; and she named the persons amongst whom it should be divided.

This document was signed by her in the presence of two credible witnesses, but, inasmuch as her signature was placed considerably below the end of the writing, the document could not be admitted to probate as a will.

The question in dispute was whether this document was a valid exercise of the power of revocation and fresh appointment contained in the settlement. Mrs. Barnett died in March, 1849, without having exercised the power in any other way.

In July, 1849, a new trustee of the settlement was appointed by a deed which recited the document of August 26, 1846.

The tenant for life under the settlement as modified by the document died in 1897.

This summons was taken out by the last surviving trustee of the settlement of 1838 to determine (inter alia) whether the document of August 26, 1846, operated as an appointment under the power contained in the settlement, and, if not, who was entitled to the trust funds.

John Henderson, for the trustee.

J. F. W. Galbraith, for a party who claimed to be entitled under the document of 1846 to a share of the settled funds. The document of 1846 was intended to operate, and did operate, as a valid appointment, and it has always been acted on as such. If the document had been actually a will there is authority for saying that it would have operated as an execution of a power to appoint by "writing or writings": *Collard* v. *Sampson*. (1) It was not the less a writing because it could not be proved as a will.

[He was stopped by the Court.]

Coles, for a party who took under the settlement in default of revocation and reappointment. The document is void under the first words of s. 10 of the Wills Act. It was testamentary in character, and revocable until the death of Mrs. Barnett; therefore it was

(1) (1853) 4 D. M. & G. 224, 227

void unless it was executed as a will in accordance with the terms of the Wills Act. It was an ambulatory disposition of property not to take effect till her death, and was the very kind of document struck at by the Wills Act. The Legislature intended that every document intended to take effect on death should be executed as a will. By s. 1 of the Wills Act the word "will" extends to an appointment "by writing in the nature of a will in exercise of a power," which is an accurate description of the document of 1846. It is therefore clear that it is an "appointment made by will" within the first sentence of s. 10, and is invalid because it is not properly executed. Mrs. Barnett need not have made the appointment in a testamentary form; but she chose to do so, and ought to have complied with the statutory formalities. As it is, the document has no effect at all: *In re Daly's Settlement.* (1) On the other hand, the decision in *In re Broad* (2) is inconsistent with the total avoidance of the document. In that case, however, the first part of s. 10 was not referred to, and the question was treated purely as one of construction.

J. F. W. Galbraith, in reply. This is a question of the construction of the words of the settlement. Mrs. Barnett had power to appoint by any writing or writings duly executed in the presence of two credible witnesses, and the document of 1846 answers that description. The property did not fall in till her death, so the appointment was necessarily ambulatory in form. The document is not a "writing in the nature of a will" within s. 1. It is severable; it refers partly to the policy and partly to her own property, and the part which purports to be an appointment of the settled funds was not revocable. It was not made void by the first part of s. 10, for the whole of that section must be read together, and, as is shewn by the marginal note, it refers to appointments by will only; whereas this is an appointment by writing. The object of the section was to provide that in cases where additional formalities were prescribed by the settlement the appointment should be good provided the statutory formalities only were complied with: *Collard* v. *Sampson.* (3) The section

(1) (1858) 25 Beav. 456, 460. (2) [1901] 2 Ch. 86.
(3) 4 D. M. & G. 224, 227.

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applies only to powers requiring specifically a will, and does not affect powers requiring an instrument in writing: Farwell on Powers, 2nd ed. pp. 173, 174; *West* v. *Ray* (1); *Taylor* v. *Meads.* (2) A decision to this effect is implied in *In re Broad* (3), though the section was not referred to. All the formalities required by the settlement have been fulfilled, and the appointment is therefore valid.

Ward Coldridge and *H. W. Wickham*, for other parties, supported the same contention.

WARRINGTON J. There are two questions in this case. The first question is whether the document of August 26, 1846, is an "appointment made by will" within the meaning of s. 10 of the Wills Act; and the second question is whether, if that document is an "appointment made by will" within the meaning of that section, it is a valid execution of a power to appoint by "writing or writings"; the document in question not being executed in accordance with the formalities required by the Act. [His Lordship stated the facts, and continued:—] If it were not for the provisions of the Wills Act, it could hardly be contended that the document of 1846 was not a valid exercise of the power. The power is to appoint "by any deed or deeds writing or writings with or without power of revocation to be by her duly executed in the presence of two or more credible witnesses." This document was a writing duly executed in the presence of two credible witnesses, and would therefore fall within the terms of the power. The whole question turns on the provisions of s. 10 of the Wills Act; and the construction of the first part of that section has never, as far as I can see, come before the Court directly for judicial determination, although there have been plenty of cases which turned on the second part. The section is as follows: "No appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will,

(1) (1854) Kay, 385, 393. (2) (1865) 4 D. J. & S. 597, 602.
(3) [1901] 2 Ch. 86.

notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity." The word "will" is defined in s. 1 of the Act to "extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power. . . . ." In the first place, is this document of 1846 an appointment made by a "writing in the nature of a will"? I will not read it again; it must be patent to everybody who heard it read that this was a document intended to take effect at Mrs. Barnett's death, and not before. That is to say, that it was to have the characteristics of a will, and was intended to express the desires of the person who signed it as to what should be done with the property of which she was capable of disposing, after her death, and not before. It is sufficient to refer to the terms of the directions to pay her funeral expenses and debts out of the money at her bankers, which must mean the amount of money in her bank at the date of her death, to make it clear that the document, taken as a whole, was intended to operate as part of her testamentary dispositions, and was not intended to be an immediate disposition of the property. But it is said that, although that may be true with reference to that part of it in which she was dealing with property other than that comprised in the settlement, it does not apply to what she was dealing with under the power of appointment. But I cannot separate the document like that; I must deal with it as a whole; and in my opinion it is a will within the definition of a will in the Wills Act, and therefore ought to have been executed with the formalities required by that Act.

If I am right in saying that this was an appointment made by will, the question is whether it is invalid by reason of the provisions of s. 10. The provision of that section applicable to this case is the first sentence of the section, "No appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required." This is an appointment made by will, and is an exercise of a power; the express words of the section, therefore, would make it invalid. It is said that I must read into the section after the words "of any power" the words "to appoint by will," and read it as if it

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had said "no appointment made by will, in exercise of any power to appoint by will, shall be valid"; so that, as this is only incidentally a power of appointment by will, because by the literal words of the settlement it has to be by "writing," the first part of this section does not apply, because it is an appointment made in exercise of a power to appoint by writing, and not in exercise of a power to appoint by will. The only argument that can be adduced in support of that contention is derived from the words used in the second part of the section, and the way in which they have been treated in *Taylor* v. *Meads* (1) and *West* v. *Ray*. (2) The point in both those cases was this. There was a power to appoint by writing signed, sealed and delivered in the presence of and attested by two or more credible witnesses—that is a formality larger than that required by the Wills Act—and reliance was placed on the second part of the 10th section in support of the contention that the document was valid as an appointment, although not executed with the extra formalities required by the document creating the power, which were necessary to make it a valid execution of the power. It was pointed out in those cases that the part of the section which the Court was dealing with, namely, the second part of the section, only applied to appointments which were required to be made by will, and that they were not dealing with appointments to be made by will, but with appointments to be made by writings executed in a particular way. The powers could be exercised by will, but they were not necessarily appointments by will, and therefore that part of the section did not apply. These cases are not authorities in the present case. It is true that the learned judges in those cases spoke of the 10th section as that with which they had to deal, and they gave their views of the meaning of that which they so described; but it is obvious when the section is read that they were referring to the part of the section which was material to the cases with which they were dealing, and not the part I am dealing with. It is impossible for me to construe that section otherwise than in accordance with its plain meaning; and if I find a document which purports to be an appointment by will, it is clear that that cannot be valid unless it is executed in

(1) 4 D. J. & S. 597. (2) Kay, 385.

accordance with the formalities required by the Act. And there is a very good reason for this provision. If a person having a power of appointment by writing exercises it by an ambulatory document which is not to operate till after his death, and is therefore revocable although no express power to revoke is reserved, it is a will, and ought to be executed as a will in accordance with the Act if it is to be valid. That is the plain meaning of the section, and in the absence of authority to the contrary I must hold that this is not a valid exercise of the power.

But I cannot part with the case without referring to an authority which is to some extent adverse to this decision—*In re Broad.* (1) The facts there were that under the instrument creating the power the appointment might be made by writing or writings sealed and delivered in the presence of two or more credible witnesses, or by will or by any writing in the nature of or purporting to be a will. The donee of the power in that case had signed a document purporting to be a will, but had not executed it in accordance with the Wills Act; and Kekewich J. held that, as it clearly purported to be a will, although it might not be in the nature of a will, it was a valid exercise of the power. The result of that case is adverse to the decision I am about to pronounce, but I do not consider that it is an authority against it, for this reason. The 10th section, which is the determining factor in my decision, was not referred to at all in that case. Whether the learned judge and the counsel on both sides forgot the first part of s. 10, which is not often referred to—whether we (2) all forgot it or not, I do not know; but the learned judge dealt with the question as if the first part of the section did not exist. He dealt with it purely as a question of construction; and said: "Here I have a power which can be exercised by a document purporting to be a will, and I have a document which is not a will but purports to be a will, and therefore I hold that that document is a proper exercise of the power." I do not say anything about the correctness or incorrectness of that decision. If I said anything about it at all, I should say that it seemed to me to be perfectly obvious, in the way I have stated it, that the

(1) [1901] 2 Ch. 86.

(2) Mr. Justice Warrington, then K.C., was of counsel for the plaintiff.

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decision must have been as the learned judge decided. But the particular point with which I have to deal was not before him, so it is not an authority on which I can place any reliance. I only have to construe a few words of the statute. On the true construction of the document this is an "appointment by will in exercise of a power," and is invalid as an exercise of the power inasmuch as it was not executed in accordance with the Act.

Solicitors: *Dawes & Sons; Griffith & Gardiner; Campbell Wade, for Nockolds & Wade, Bishop's Stortford.*

H. C. R.

WARRINGTON J.
1908
Jan. 24.

In re WILLIAM FALCONER'S TRUSTS.
In re ANN FALCONER'S TRUSTS.
PROPERTY AND ESTATES COMPANY, LIMITED *v.* FROST.

[1907 F. 224.]

Power of Appointment—Partial exercise of, by Donee—Range of Investments authorized by Instrument creating Power — Extension of, by Donee—Validity.

Where the donee of a power of appointment does not appoint to objects of the power he cannot alter the range of investments authorized by the instrument creating the power.

A testator by his will gave all his real and personal estate to trustees upon trust to sell and convert and to invest the proceeds in certain investments which did not include mortgages of leaseholds, and he directed them to pay the income of the trust estate to his wife for life, and after her death to hold the trust estate upon trust for such of his nine children as his wife should by will or codicil appoint, and in default of appointment upon trust to divide the same among his nine children in equal shares. The testator's widow by her will, in exercise of the power given her by the testator's will, appointed certain sums to her daughters in respect of their one-ninth shares, and declared that the trustees of the testator's will might invest the moneys subject to the trusts of that will in certain securities which were not within the range of investments thereby authorized, including mortgages of leaseholds. By a codicil to her will the widow, in further exercise of the power, declared that the trustees of the testator's will should hold two of the one-ninth shares of the trust estate upon trusts in favour of certain objects of the power, and, subject to a slight modification in the amounts of the sums appointed by her will, made by a second codicil, she allowed the bulk of the trust estate to pass under the testator's will in default of appointment. After her death the trustees of the testator's will

invested part of the trust estate upon mortgage of certain leasehold premises :—

Held, that the trustees of the testator's will had no power to invest upon leasehold security funds representing shares subject to the trusts of the will passing in default of appointment.

ADJOURNED SUMMONS.

William Falconer, by his will dated March 3, 1876, devised and bequeathed all his real and personal estate unto his trustees upon trust to call in, sell or convert into money such part of his personal estate as should not consist of money, and thereout to pay his funeral and testamentary expenses and debts, and to lay out and invest the residue of such moneys in the names of his trustees in or upon any of the stocks, funds, shares or securities in or upon which the trust fund might by law be invested by trustees, with power for his trustees from time to time to vary the said stocks, funds, shares and securities or any of them, or any stocks, funds, shares and securities in or upon which any part of his personal estate at his decease should be invested at their discretion into or for any other of the investments thereby authorized. And the testator directed his trustees to pay the rents and profits of his real estate and the annual income of the trust moneys to his wife, Ann Falconer, during her life, and at her decease he directed that his trustees should sell the said real estate as therein mentioned, and should hold the moneys to arise from the sale thereof and the said trust moneys, stocks, funds and securities, and the annual income thereof, upon trust for all or such one or more of his nine children therein named, or of all or any of their, his or her respective children, and if more than one in such shares and proportions to vest at such time or times, with such provisions for maintenance, education, advancement and otherwise, and generally in such manner and form in every respect as his wife should by her will or any codicil thereto notwithstanding coverture appoint. And in default of any and subject to every such appointment the testator declared that his trustees should divide the trust estate into nine equal parts, and that one of such equal parts should be appropriated, or considered to be appropriated, to each of his nine children as therein mentioned. The will also contained provisions for the settlement of some of the children's shares.

WARRINGTON J.

1908

WILLIAM FALCONER'S TRUSTS, *In re.* ANN FALCONER'S TRUSTS, *In re.* PROPERTY AND ESTATES COMPANY, LIMITED *v.* FROST.

William Falconer died on July 11, 1877, and his will was duly proved by the executors therein named.

Ann Falconer, by her will dated September 30, 1890, pursuant to and in exercise of the power for that purpose given to her by the will of her late husband, appointed and declared that the trustees for the time being of her late husband's will should from and after her decease stand possessed of the trust funds and premises then subject or thereafter to become subject to the trusts of the same will, upon trust out of the said trust estate to pay to each of her daughters named in the testator's will, her executors or administrators, the sum of 2000*l.*, such payment to be taken and considered as part of the one-ninth share of the trust estate appropriated, or considered as appropriated, to each of her said daughters under the said will. And the testatrix declared, so far as she lawfully might and could, that the trustees for the time being of the will of her late husband as to the moneys representing the trust estate or any part thereof, and her trustees as to any moneys required to be invested under her will, might invest the same in their respective names in or upon any of the stocks, funds or securities authorized by the Trust Investment Act, 1889, and certain other securities which were not within the range of investments authorized by the testator's will, including mortgage of leasehold hereditaments held for a term whereof at least sixty years remained unexpired at the date of the investment.

By a first codicil to her will, dated January 29, 1891, the testatrix, in further exercise of the said power of appointment, declared that the trustees of her late husband's will should hold two ninth parts of the trust estate upon the trusts therein specified in favour of certain objects of the power, and, subject to a slight modification in the amounts of the sums appointed by her will, made by a second codicil dated February 21, 1891, she allowed the bulk of the trust estate to pass under the original will in default of appointment.

Ann Falconer died on October 20, 1891, and her will and the two codicils thereto were duly proved.

After her death the real estate of the testator was sold by the trustees of his will, and a portion of moneys representing his residuary real and personal estate was invested by them upon mortgage of certain leasehold premises.

This was a summons taken out by the plaintiff company, who claimed by assignment to be beneficiaries under the said wills and codicils, for the determination (inter alia) of the question whether the trustees for the time being of the will of the testator, by virtue of the appointment or directions contained in the will and codicils of the testatrix, had power to invest the funds subject to the trusts of the said will upon leasehold security.

Maugham, for the summons. The donee of the power has not appointed the fund, and cannot, therefore, alter the investment clause contained in the testator's will: Farwell on Powers, 2nd ed. pp. 325-6.

[WARRINGTON J. I think the onus is on the trustees to shew that they had power to invest on leasehold securities.]

P. F. Wheeler, for the trustees of both wills. The appointment by the testatrix extending the power of investment in the testator's will is legal.

[WARRINGTON J. How can an appointor affect persons who take in default of appointment?]

Allowing the property to go in default of appointment is equivalent to appointing to the persons entitled in default of appointment. Here the donee, by not exercising the power in full, adopted the gifts in default of appointment as part of her appointment. A power of appointing real estate is well executed by devising to trustees to sell and an appointment of the money produced by the sale: *Kenworthy* v. *Bate.* (1) *Webb* v. *Sadler* (2) shews what a very wide power may be exercised by the donee of a power of appointment. It is, it is submitted, a fair deduction from the cases to say that the donee of a power of appointment can enlarge the range of securities authorized by the donor, and that the trustees in the present case had power to invest on leasehold securities. The cases on this point were considered in *In re Adams' Trustees and Frost's Contract.* (3)

Owen Thompson, for the beneficiaries other than the plaintiffs, was not called upon.

(1) (1802) 6 Ves. 793. (2) (1873) L. R. 8 Ch. 419.
(3) [1907] 1 Ch. 695.

WARRINGTON J. 1908 — WILLIAM FALCONER'S TRUSTS, *In re.* ANN FALCONER'S TRUSTS, *In re.* PROPERTY AND ESTATES COMPANY, LIMITED *v.* FROST.

WARRINGTON J. The question is whether by the joint effect of the will of William Falconer and the will and codicils of his widow Ann Falconer, by which she purported to exercise a power of appointment given to her by her husband's will, the trustees of William Falconer's will have power to invest in a wider range of securities than those authorized by that will. [His Lordship stated the facts, and continued:—] If Ann Falconer had made an appointment of the whole of the property to the persons named in the power of appointment as objects of the power, or to any of them, it might, I think, on the authorities, have been competent to her to determine the form in which they should enjoy the property appointed to them, and to that extent she might have said that the property should go in the form in which she decided, and not in that which the testator directed. But that is not what she has said. She has not said that property appointed by her shall be taken in a particular form. The fact is that, as to the bulk of the estate, she has not appointed at all. For the purposes of the present question I must treat it that she has made no appointment. The property with which I have to deal goes as in default of appointment. It goes under the original will. Those who take it are entitled to say it shall be taken in the form determined by the original will, and in no other. The argument addressed to me is that, inasmuch as Ann Falconer had power to appoint the whole property to go in a particular way, and as she has appointed a part of it, she must be treated as if she had also appointed the rest of the property. But no authority is produced in support of that proposition, and I cannot accede to it. I must, therefore, hold that Ann Falconer had no power to alter the mode of investment provided for by her husband's will so far as regards property passing in default of appointment, and I must answer the question of the summons by declaring that the trustees of the will of the testator have no power to invest upon leasehold security funds representing shares subject to the trusts of the will passing in default of appointment.

Solicitors: *Oldfield, Bartram & Oldfield; Sharp & Benest; Marshall & Pridham.*

W. I. C.

In re T. H. SAUNDERS & CO., LIMITED.

WARRINGTON J.

1908

Jan. 24.

Company—Register of Members—Rectification—Deceased Member—Executors, whether to be described as such in Register—Order of Entry of Names—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 25, 30, 35.

The articles of association of a company provided (article 13) that the company should not be bound by nor recognize any equitable, contingent, future, or partial interest in any share, nor (except only as by its regulations otherwise expressly provided) any right or trust in respect of a share other than an absolute right thereto in accordance with its regulations, in the persons from time to time registered as the holders thereof; (article 14) that every member should be entitled to a certificate under the seal of the company specifying the share or shares held by him, and the amount paid up thereon; (article 24) that the executors or administrators of a deceased member, not being one of several joint owners, should be the only persons recognized by the company as having any title to his share or shares; (article 25) that any person becoming entitled to a share in consequence of the death of any member, or by any lawful means other than by an ordinary transfer, might be registered as a member upon such evidence of title being produced as might from time to time be required by the directors; and (article 26) that any person who had become entitled to a share in consequence of the death of any member might, instead of being registered himself, elect to have some person, to be named by him, registered as a transferee of such shares.

M. was the registered holder of shares of the company. Upon his death his executors requested the company to register them as members in respect of the shares formerly held by him. The company refused to register the executors in the company's books otherwise than in their representative capacity and as being the parties entitled to legally transfer the shares held by the deceased. On an application by the executors to rectify the register:—

Held, that applicants were entitled to have their names entered on the company's register, without any statement that they held the shares in a representative capacity, and to have them inserted in such order as they chose.

MOTION.

T. H. Saunders & Co., Limited, was incorporated on February 27, 1896, under the Companies Acts, 1862 to 1890, with a capital of 30,000*l.*, divided into 2000 preference shares of 10*l.* each and 1000 ordinary shares of 10*l.* each.

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The articles of association of the company, so far as material, were as follows: —

Article 13: "The company shall not be bound by nor recognize any equitable, contingent, future or partial interest in any share, nor (except only as by its regulations otherwise expressly provided) any right or trust in respect of a share other than an absolute right thereto in accordance with its regulations, in the persons from time to time registered as the holders thereof."

Article 14: "Every member shall be entitled to a certificate under the seal of the company specifying the share or shares held by him, and the amount paid up thereon. . . . ."

Article 24: "The executors or administrators of a deceased member, not being one of several joint owners, shall be the only persons recognized by the company as having any title to his share or shares."

Article 25: "Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or by any lawful means other than by an ordinary transfer, may be registered as a member upon such evidence of title being produced as may from time to time be required by the directors."

Article 26: "Any person who has become entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, may, subject to the regulations as to transfers hereinbefore contained, instead of being registered himself, elect to have some person, to be named by him, registered as a transferee of such shares. (1) The person so becoming entitled shall testify such election by executing to his nominee an instrument of transfer of such share."

Article 73: "If two or more persons are jointly entitled to any share, the member whose name stands first in the register of members as one of the holders of such share, and no other, shall be entitled to vote in respect of the same, but any joint holder shall be eligible as a proxy."

Thomas Monckton was a former director of the company, and was the registered holder of 484 preference shares and 100 ordinary shares in the company. He died on October 7, 1907, having by his will appointed his wife Grace Ellen Monckton and

(1) *Sic.*

his two sons Thomas Edward Monckton and Frank Henry Monckton executors thereof, and they proved his will on November 8, 1907.

On December 11, 1907, the solicitors for the executors wrote to the solicitor of the company enclosing a request signed by the three executors to be registered as members in respect of the shares formerly held by Thomas Monckton. That request was not complied with.

On January 6, 1908, the company's solicitor, under the instructions of the company, wrote to the executors' solicitors stating that he had advised his clients that they were not bound to register the executors in the company's books otherwise than in their representative capacity and as being the parties entitled legally to transfer the shares held by the deceased; that the company had already done this, and that there was therefore nothing further for it to do in the matter.

On January 11 the executors gave the company notice of motion under s. 35 of the Companies Act, 1862, for an order that the register of members might be rectified by removing the name of Thomas Monckton therefrom as the holder of the shares in question, and by substituting the names of the applicants as the holders of such shares.

Further correspondence ensued, but, no satisfactory arrangement having been come to, the motion was brought on.

Martelli, for the applicants. The applicants are entitled to have their names entered on the company's register of members without any note or reference to the fact that they are executors, and to have a clean certificate of the shares issued to them. By s. 30 of the Companies Act, 1862, no notice of any trust, expressed, implied, or constructive, may be entered on the register. To enter, therefore, a statement on the register that the applicants hold the shares as executors is directly contrary to the section.

The question is not without authority. In *In re W. Key & Son, Ld.* (1), where the transmission clause was clause 13 of Table A, which is identical with article 25 of the articles in the present case,

(1) [1902] 1 Ch. 467.

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Byrne J. held that the trustee in bankruptcy of a shareholder was entitled to be registered in respect of and to have a certificate of the shares of the bankrupt, and that the company had no right to enter in the register of members or in his certificate any statement as to the company's claim under its articles to a lien on the shares for the liabilities of the bankrupt to the company.

Further, having regard to the fact that the person whose name appears first on the register is the only person entitled to vote, the applicants desire to have their names entered on the register in the order in which they occur in the notice of motion, namely, Frank Henry Monckton, Grace Ellen Monckton, Thomas Edward Monckton, and not in that in which they appear in the will or probate.

H. Terrell, K.C., and *Tyldesley Jones*, for the company. Where shares are acquired by a person by transmission as distinguished from transfer, it is the common practice of companies to record the fact by an entry on the register, and there is nothing in the Companies Acts to prevent their so doing. The present case being one of transmission, and not of transfer, the applicants' title to the shares would not appear from the transfer book. A note such as is proposed is, therefore, necessary in order to preserve evidence as to how the shares came to the executors, and cannot hurt the executors. *In re W. Key & Son, Ld.* (1) is a direct authority in the company's favour. There no objection was taken to the registration of the applicant as A. E. Preston, "trustee of the property of Thomas Henry Norris, a bankrupt."

[WARRINGTON J. There is nothing to prevent a company preserving evidence of transmission.]

It would be a great inconvenience to a company to have to keep a separate book for this purpose.

[WARRINGTON J. Sect. 25 of the Companies Act, 1862, enumerates the particulars which are to be entered on the register.]

But the section does not say that a company may not put on additional particulars.

(1) [1902] 1 Ch. 467.

[WARRINGTON J. referred to s. 30 of the Companies Act, 1862.] That section is for the protection of companies, and not of trustees. There is nothing in the Act which says that the company in the present case cannot put on the register for the information of future officers of the company a note that the applicants acquired the shares by transmission. Moreover, describing the applicants as executors is not entering notice of a trust on the register. *Simpson* v. *Molsons' Bank* (1), where the question arose as to notice of a trust, illustrates the common practice of entering a note on the register. The note there entered was, "to executors, viz. William Molson and Alexander Molson, for transmission." There is no authority to shew that such a practice is wrong. In *Barton* v. *London and North Western Ry. Co.* (2) and *Duff's Executors' Case* (3) the description "as executors" was treated as immaterial.

[WARRINGTON J. How is the company's position bettered by having those words put on the register?]

It is useful to it as preserving evidence of the applicants' title. The members of a company have no right to dictate to the company as to the manner in which the company is to keep its books. Under s. 25 of the Companies Act, 1862, the obligation of keeping a register is imposed on the company, and it is therefore the duty of the company to see that the register is properly kept. If a company puts something on the register which is useful to it and not inaccurate, and which is not prejudicial to a particular member, that member cannot come to this Court and complain.

As regards the order in which the names of the applicants are to be entered on the register, technically that is a matter for the company to decide, but the company is willing to enter the names in such order as the applicants shall choose.

WARRINGTON J. The real question in this case is whether a company is entitled to insist on inserting in the register of its members a statement that certain members are entered on the register as the executors of a deceased shareholder.

(1) [1895] A. C. 270. (2) (1889) 24 Q. B. D. 77, 86.
(3) (1886) 32 Ch. D. 301.

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Now the question arises in this way: Thomas Monckton was a shareholder in the company holding ordinary and preference shares. He died in October, 1907, having made a will whereby he appointed three persons, his wife and two sons, his executors. That will was proved, and on December 11, 1907, the solicitors for the executors wrote to the secretary of the company, enclosing a request signed by the three executors to be registered as members of the company in respect of the testator's shares. That request was not complied with, and on January 6, 1908, the solicitor of the company, under its instructions, wrote to the solicitors for the executors a letter in which he expressed the refusal of the company so to register, and in which he said this: "I have carefully considered the question raised by the application, and have advised my clients that (though 25 of the company's articles of association would allow them to do so, if they so desired) they are not bound to register the executors in the company's books otherwise than in their representative capacity, and as being the parties entitled to legally transfer the shares held by the deceased." What that meant will appear presently: "The company has, I am informed, already done this, and there is therefore nothing further for it to do in the matter." That last sentence shews what was meant by registering the executors in their representative capacity. What the company had already done was to enter against the name of Thomas Monckton, or in lieu of the name of Thomas Monckton, the words "Executors of Thomas Monckton"; and the latter part of the letter, which I do not propose to read, because it would be waste of time, shews plainly what was meant. It was meant to exclude the executors from voting and from all participation in the company's business. The letter stated the reasons why, and the object plainly was as expressed in that letter.

That letter, not unnaturally, was followed by the present notice of motion, which asks that the register should be rectified by removing the name of "Thomas Monckton" and inserting the names of the three executors. The notice of motion is dated January 11. On January 14 the company's solicitor wrote to the executors' solicitor a letter in which he said

this: "It appears that the late Mr. Monckton's executors have already been noted in the register in the late Mr. Monckton's various holdings." What that means I have already stated. Their names did not appear. Then he said: "Thus they are in fact now already registered, as I informed you in my letter of the 6th instant. As you are aware, the company has always been willing to so register them, but if they desire that in addition to this their names should appear thus"—mentioning them—"'Grace Ellen Monckton, widow, Thomas Edward Monckton, Frank Henry Monckton, executors of Thomas Monckton deceased,' there is no possible objection, and my clients will have the necessary addition made in the register." That offer was not accepted by the executors, who demanded a clean registration of their names in order that they might have a correspondingly clean certificate in their names On January 15 the company's solicitor wrote a further letter stating that the company was ready and willing to enter in the register of members as holders the names of the three executors, "Executors of Thomas Monckton, deceased," and that the company would issue certificates accordingly. That letter was not held to be sufficient, and the motion is now brought on.

As I have said, the question is, Can the company insist on having that qualification inserted after the names of three of its members? Sect. 25 of the Companies Act, 1862, provides that "Every company under this Act shall cause to be kept in one or more books a register of its members, and there shall be entered therein the following particulars: (1.) The names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number; and of the amount paid or agreed to be considered as paid on the shares of each member: (2.) The date at which the name of any person was entered in the register as a member: (3.) The date at which any person ceased to be a member." Those are the particulars which the Act of Parliament affirmatively requires the company to insert in its register, and the section provides for the infliction of penalties upon directors and officers who neglect to

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properly keep the register accordingly. Then s. 30 provides what the company shall not enter on the register: "No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies under this Act and registered in England or Ireland." The material part of that section is that no notice of any trust, expressed, implied, or constructive, shall be entered on the register. The articles of this particular company which are material are: [His Lordship read articles 13, 14, 24, 25 and 26.] Articles 25 and 26, taken together, shew that the expression "may" in article 25 does not indicate any discretion on the part of the company. Those two articles merely express alternative rights possessed by the executor. He may either be registered himself, or he may elect to have some person registered as a transferee, and if he elects to be registered himself he elects to be registered as a member, and the certificate to which he would then be entitled is a certificate of the shares held by him as a member.

Under these circumstances is there, or is there not, the right on which the company insists? The only ground on which the company puts its alleged right is that of the necessity or the desirability, at least from its point of view, of preserving evidence of the nature of the transmission of the shares in question. That seems to me, with all respect to those who have put it forward, to be a reason which, so far as this question is concerned, is no reason at all. Of course the company is entitled to preserve in its books a record of the mode in which the shares come to be transmitted. The question is, Is it entitled to put it on the register, that is to say—is it entitled to qualify in the register the insertion of the name of the executors as members, and qualify it in such a way that the qualification will also appear on the certificate of the shares? In my opinion it is not. In my judgment, when one looks at the Act of Parliament and at the articles of this particular company, the strict right of the executors upon which they are here insisting (and I think, having regard to the letter of January 6, for good reasons insisting) is to have their names inserted, and nothing else.

It is said that it is the common practice of companies to enter the names of executors in this way. That may well be, and in most cases it is not worth the executors' while to insist on what I conceive to be their strict rights; but when they do so insist, I think their strict rights are to have entered their names, addresses and occupations, the number of shares held by them and the date at which they are entered in the register, and nothing else—that is, nothing beyond the particulars which are stated in s. 25 of the Companies Act, 1862; and I think, also, that s. 30 of that Act in terms prevents the placing on the register of members any statement which would qualify the entry of their names so as to shew that they do not hold as absolute owners. They are entitled to have their names put on the register, in my opinion, without qualification if they so insist.

There is only one further question, if it can be called a question, and that is as to the order in which the names of the executors shall be inserted. Mr. Terrell has said that the company may, if it pleases, insist on having the names of the executors inserted in such order as it chooses. He does not so insist, but he says he might so insist, if he chose to do so, on his strict rights in that respect. That appears to me to be an entire misconception of the position of the company. It seems to me that the joint holders of shares are entitled to arrange among themselves which of them shall stand first on the register of members and exercise on behalf of all the right of voting which belongs to them collectively. The executors in this case desire to have their names inserted, not in the order in which they appear in the will or in the order in which they appear upon the probate, but in a different order. The company is willing to enter them in that order, and I think, therefore, the executors are entitled to the order asked for by the notice of motion. The names of the applicants are stated in the notice of motion in the order in which the applicants desire to appear on the register, and I think the register must be rectified by inserting their names in that order; and, as the company has resisted the motion, it must, of course, pay the costs of it.

Solicitors: *Druces & Attlee; Charles Marchant.*

W. I. C.

NEVILLE J.

1907

Dec. 9, 10.

SPRANGE *v.* LEE.

[1906 S. 4471.]

Married Woman—Restraint on Anticipation—Annuity—Release by Married Woman—Covenant not to sue—Acquiescence—Action by Administrator for Arrears of Annuity—Damages for Breach of Married Woman's Covenant—Direction in Will to pay Debts—Assets—Married Women's Property Act 1893 (56 & 57 *Vict.* c. 63), *s.* 1.

A direction in the will of a married woman that her debts shall be paid makes all the property she has power to dispose of, including arrears of an annuity which was subject to a restraint on anticipation, assets for payment of all liabilities of her separate estate, including damages for breach of covenant by her legal personal representatives.

By a separation deed the husband covenanted to pay 1000*l.* to a trustee upon trust to pay the income thereof to the wife for her separate use without power of anticipation, and to pay him a further annual sum upon the same trusts. Afterwards the husband sued for a divorce. The proceedings were compromised by a deed whereby the wife and the trustee purported to release the husband from his covenant to pay the further annual sum, and she and a surety covenanted with the husband that neither she nor any person on her behalf should take proceedings to compel the husband to allow her any support, maintenance, alimony, or additional income other than the income of the 1000*l.* The wife lived ten years after this deed, and on every quarter-day she received from the trustee a cheque for 10*l.*, representing the income of the 1000*l.*, and made no claim for more. The 1000*l.* was not in fact invested, and the 10*l.* a quarter was found by the husband.

The wife made a will whereby she directed all her debts to be paid, and gave her property to an adopted daughter for life. Her legal personal representative brought this action against the husband for arrears of the annuity. The husband counter-claimed for damages for breach of the wife's covenant:—

Held that, the release of the husband's covenant being admittedly void, the conduct of the wife, in accepting the trustee's cheques for less sums than were due, did not amount either to accord and satisfaction, or to such acquiescence as would prevent the wife claiming the arrears. Her representative was therefore entitled to succeed in the action.

Held, also, that the wife's covenant not to sue was not personal to herself or confined to her lifetime; that it bound all her free separate estate; and that the direction in her will for payment of debts made the arrears of the annuity assets for payment of damages for breach of her covenant.

The husband was therefore entitled to recover back on the counter-claim

all the money and costs which he might be ordered to pay in the action. No order was made except that the plaintiff should pay the costs of the action and of the counter-claim.

By a separation deed dated August 3, 1888, made between Charles Eyre Lee of the first part, Eugenie Ellen Lee, his wife, of the second part, and a trustee of the third part, after a recital of the agreement to separate, the husband covenanted to pay 1000*l.* to the trustee, to be held by him upon trust to invest, and so long as the husband and wife should live separate to pay the income thereof to the wife for her separate use, and so that she should not have power to dispose thereof by way of anticipation; and the husband covenanted with the wife, and as a separate covenant with the trustee, during the joint lives of the husband and wife, if they should so long live separate, to pay to the trustee such annual sum as would, together with the dividends, interest, and annual proceeds to arise from the investments of the said 1000*l.*, make up a total sum of 100*l.* per annum, such additional annual sum to be held by the trustee upon the trusts hereinbefore declared as to the income of the said sum of 1000*l.*, but so that the payment of the said annual sum should cease if the wife should commit a breach of any of the covenants on her part thereinafter contained, or if the marriage between the said husband and wife should at any time be dissolved by a Court of competent jurisdiction.

On February 15, 1896, the husband presented a petition for a divorce.

The proceedings in this petition were compromised by a written agreement dated July 1, 1896, which provided that the wife and trustee should execute a deed of release therein mentioned, and the wife should on the request of the husband take and carry through all necessary proceedings to obtain the sanction of the Court to the said release, such request only to be made in case of a breach of the agreement or of the covenants in the deed of release. The deed referred to was dated the same day, and by it the wife and the trustee purported to release the husband from his covenant in the separation deed to pay to the trustee the annual sum which, with the income of the 1000*l.*, would make up 100*l.* a year; and the wife and a surety jointly and severally covenanted

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with the husband that the said wife, or any person on her behalf, should not, nor would at any time thereafter, commence or prosecute any action or other proceeding for compelling the said husband to allow her any support, maintenance, alimony, or additional income other than the dividends, interest, and annual proceeds arising from the investments of the said sum of 1000*l.* as provided for by the separation deed, and should not nor would molest the husband in any manner.

From July 1, 1896, until her death the wife lived separate from her husband, and on each successive quarter-day from that date the trustee sent her a cheque for 10*l.* as one quarter's income of the 1000*l.* She received this without complaint or ever making any claim for any additional sum. She died on March 10, 1906, having by her will appointed an executor, directed payment of her debts, and subject thereto given all her real and personal estate to an adopted daughter for life. The executor died in the wife's lifetime, and the plaintiff took out administration with the will annexed.

The plaintiff, as administrator, brought this action against the husband and the trustee for payment of the arrears of the annual sum covenanted to be paid by the husband in the separation deed, calculated at 60*l.* a year, from July 1, 1896, to the wife's death.

The husband counter-claimed against the administrator and the surety, who was made a defendant to the counter-claim, for damages for breach of the wife's covenant in the deed of release.

Jenkins, K.C., and *Elgood*, for the plaintiff. So far as the action is concerned, there is no defence. A married woman's restraint upon anticipation can only be removed by the Court, under the provisions of the Conveyancing Act, 1881, or possibly under its original jurisdiction, as part of a compromise: *Wilton* v. *Hill* (1); *Wall* v. *Rogers* (2); but this is doubtful: see Lord Cranworth's judgment in *Robinson* v. *Wheelwright*. (3) The married woman herself cannot get rid of the restraint by estoppel: *Lady Bateman* v. *Faber* (4); or in any other way.

(1) (1855) 25 L. J. (Ch.) 156.
(2) (1869) L. R. 9 Eq. 58.
(3) (1856) 6 D. M. & G. 535, 544.
(4) [1898] 1 Ch. 144.

Peterson, K.C., and *Wurtzburg*, for the husband. We do not contend that a married woman can by a release get rid of the restraint on anticipation. But the Court is dealing with arrears of the annuity. As soon as each payment became due Mrs. Lee could deal with it as she liked. She did on each occasion accept a cheque for 10*l.* in full payment when 25*l.* was due. That is a good accord and satisfaction, though the acceptance of a smaller sum in cash would not be: *Goddard & Son* v. *O'Brien*. (1)

[NEVILLE J. How can it be accord and satisfaction? It was paid by the trustee as an independent debt.]

It was not really an independent debt. The 1000*l.* was never invested. The 10*l.* a quarter was found by the husband and paid in satisfaction of both his covenants. If the acceptance of the cheque is not strictly speaking an accord and satisfaction, it was evidence of acquiescence, by which her husband was induced not to sue the surety, and so amounted to a release in equity: *Strong* v. *Bird* (2); *Macnaghten* v. *Paterson*. (3) A restraint on anticipation does not enable a married woman to escape the natural consequences of acquiescence: *Derbishire* v. *Home*. (4) On the counter-claim the defendant is entitled to recover, as damages for breach of the covenant by the wife and the surety in the deed of release, anything which the plaintiff may recover in the action. Mrs. Lee's legal personal representative cannot be in a better position than she was herself. The Married Women's Property Act, 1882, s. 1, sub-s. 2, gives a married woman power to enter into such a covenant, and makes damages payable out of the separate property she possessed at the time. The Married Women's Property Act, 1893, s. 1, extends the liability to after-acquired separate property. It is quite clear that the covenant binds all the separate property which Mrs. Lee had at her death which had never been restrained from anticipation. She had some such property, but not enough to answer the damages we claim. We submit that the arrears of this annuity, even if they were subject to the restraint on anticipation during her life, were also liable to answer the damages for breach of the covenant after her

(1) (1882) 9 Q. B. D. 37.
(2) (1874) L. R. 18 Eq. 315.
(3) [1907] A. C. 483.
(4) (1853) 3 D. M. & G. 80.

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death. In the first place, the restraint on anticipation is created merely for the benefit of the married woman, and has no effect after the coverture is determined by her death or otherwise: *Askew* v. *Rooth* (1); *Tullett* v. *Armstrong*. (2) The quality of separate estate disappears on the death of the married woman: *In re Lambert's Estate*. (3) In the second place, Mrs. Lee has by her will directed payment of her debts, and this makes everything she could dispose of by will, including these arrears, assets for payment of all her liabilities. A direction to pay debts out of real estate in the days when it was not otherwise liable made it assets for payment of damages for a breach of covenant after the testator's death.

Fellows, for the trustee of the separation deed.

Bramwell Davis, K.C., and *W. H. Moresby*, for the surety. On the true construction of the covenant in the deed of release it was personal to Mrs. Lee, and does not bind her legal personal representatives; and there has been no breach, for the plaintiff is not suing on behalf of Mrs. Lee, but of the infant beneficiary under her will: Williams on Executors, 10th ed. p. 1349; *Cooke* v. *Colcraft*. (4)

Again, if any part of the consideration for an agreement is illegal, the whole agreement is void: see Lord Esher's judgment in *Kearney* v. *Whitehaven Colliery Co*. (5) Here the release of the restraint on anticipation is illegal, and the whole agreement is void. In any case the surety is not liable, for no suit can be brought on a guarantee that a person shall do an illegal thing: Leake on Contracts, 5th ed. pp. 505 et seq.

Estoppel could not be pleaded against a married woman restrained from anticipation during her life: *Lady Bateman* v. *Faber* (6); but after her death all defences are open against her executor which would be open against any defendant.

Jenkins, K.C., in reply on claim and for defence on counterclaim. The agreement that the wife should obtain the sanction of the Court to the deed of release shews that the parties knew the release as it stood was bad, and the husband could

(1) (1874) L. R. 17 Eq. 426.
(2) (1838) 1 Beav. 1.
(3) (1888) 39 Ch. D. 626, 633.
(4) (1773) 2 W. Bl. 856.
(5) [1893] 1 Q. B. 700, 710, 711.
(6) [1898] 1 Ch. 144.

not have relied on the wife's promise by way of estoppel or otherwise. The plaintiff is suing upon a legal covenant; that distinguishes the case from *Strong* v. *Bird*. (1) There can be no legal accord and satisfaction, for the income of the 1000*l*. was due from the trustee, and the further sum was due from the husband. I admit that there may be a release of a debt in equity which would not be good in law: *Stackhouse* v. *Barnston* (2); *Taylor* v. *Manners* (3); *Yeoman* v. *Williams* (4); Seton on Judgments, 6th ed. p. 1422. These cases are examples of the extreme length to which the Courts have gone, but in every one of them there was some valuable consideration, or at least some clear evidence of intention; here there is nothing whatever, except the fact that the wife did not sue. On the counter-claim I submit that, on the construction of the covenant, it was not intended to refer to the payments agreed to be made by the separation deed; and there was no breach, because this action is not brought on behalf of Mrs. Lee or any one claiming under her. And the covenant is bad altogether as being a mere trick to get rid of the restraint on anticipation.

Peterson, K.C., in reply on the counter-claim.

Neville J. The first question I have to consider is whether the plaintiff, as legal personal representative of Mrs. Lee, is entitled to recover the arrears of an annuity contracted to be paid to her by her husband in a separation deed of August 3, 1888, under which he undertook to pay 1000*l*. to a trustee to invest for her and to make up the income to 100*l*. a year, to be paid for her separate use without power of anticipation. Later on the husband filed a petition for a divorce, and he and his wife entered into an arrangement which was embodied in two documents, both dated July 1, 1896. By one of these Mrs. Lee purported to release her annuity except so far as related to the dividends from the sum of 1000*l*. It is admitted that this release was inoperative, but as a matter of fact Mrs. Lee did during the rest of her life receive only the dividends on the 1000*l*., and never made any claim to anything else. She died within twenty years from the

(1) L. R. 18 Eq. 315.
(2) (1805) 10 Ves. 453, 466.
(3) (1865) L. R. 1 Ch. 48.
(4) (1865) L. R. 1 Eq. 184.

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date of the separation deed. The question is whether her legal personal representative is entitled to recover the arrears. There has been no release, and he is so entitled unless I can find that there has been some equitable satisfaction of the amount due, or that there is some incapacity on the part of Mrs. Lee and her representatives to assert the contrary. I have carefully considered all the various heads of equity which have been urged as putting an end to Mrs. Lee's right to sue, and I cannot find any one which I can apply to the present case.

It is said in the first place that there has been accord and satisfaction, because Mrs. Lee received every quarter a cheque for 10*l.* only, when 25*l.* was due. But it is impossible to hold that, because the 10*l.* represented the dividends on the 1000*l.*, which were payable by the trustee, and the 15*l.* was owing from her husband. Then it is said that what has happened amounts either to an equitable release or to acquiescence on the part of Mrs. Lee, so that her legal personal representatives cannot sue. The only case which, as it appears to me, has any bearing upon this point is *Strong* v. *Bird*. (1) But in that case the intention of the parties was undoubtedly that the balance of the debt should be released, and the Master of the Rolls found enough in the facts of the case to enable him to give effect to that intention. It is a little difficult to follow what his theory of the transaction which took place in that case was. But, however that may be, the difficulties with which I am confronted in this case did not occur. In that case there was a legal release of the debt, by the appointment of the debtor as executor, so it was not necessary to call in aid the doctrine of equitable satisfaction. It was a case, therefore, which depended on its own facts, and is not applicable here.

I have thought whether I could deal with the transaction as being equivalent to payment by the husband and repayment by the wife. If that could be done, it is a principle of equity that the Court does not require unnecessary formalities to be gone through. Consequently, where we find on one side a debt immediately payable and on the other (say) a sale of property for

(1) L. R. 18 Eq. 315.

a price equal to the amount of the debt, it is not necessary that cheques should be exchanged in order that there may be a discharge of the debt by a transfer of the property. But in those cases there is always a legal obligation on either side. I cannot introduce any such notional payment here, for this reason (among others) that the husband had a good reason for not paying this amount to his wife. Whether if he had paid it she would have repaid it we do not know. But he had obtained a covenant by his wife that she would not sue, under which, if she had sued him, she might be liable in damages. Also he had a covenant from the surety. There was no reason for paying the money when he was thus protected from any attempt to make him pay it. What Mrs. Lee did was merely that she refrained from suing; that cannot be interpreted as equivalent to payment and repayment.

Acquiescence is only another way of putting the same point. All parties were fully aware of the position, and I think that reliance was placed, not on acquiescence, but on the knowledge that a covenant was in existence which it was supposed would prevent any action by the wife or any one claiming under her.

I come to the conclusion, therefore, that the liability of the husband under the separation deed was subsisting at his wife's death, and her legal personal representative is entitled to recover the arrears of the annuity.

Then what is the effect of the covenant by Mrs. Lee? It is said that the covenant was not so expressed as to apply to the husband's liability under the separation deed. But I cannot so hold. I think that would be an unreasonable interpretation of the covenant. And I think this action is clearly a proceeding to compel the husband to allow his wife an additional income other than the annual proceeds arising from the investments of the 1000*l*. Then is this action brought by the wife or any one on her behalf? It is brought by her legal personal representative, and I think that the general rule that a covenant by any person binds his legal personal representative must apply. To hold otherwise would make the result of the covenant a mere postponement of the husband's liability. Then it is said that the covenant is a

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mere device to get rid of the restraint on anticipation. I am of opinion that it is not. If we look at the Married Women's Property Act, 1893, s. 1, it is plain that the covenant could not by any proceedings during the husband's life be made to affect the property which was restrained from anticipation. Though judgment might have been obtained against the wife on the covenant, it could not have been satisfied out of the property subject to the restraint. Whether any benefit could be obtained by an action against the wife would depend upon the question whether she had any separate estate apart from that which was subject to the restraint on anticipation. I see no objection to a married woman entering into a covenant of this kind so as to bind her separate estate as to which she is not restrained from anticipation. Judgment could be recovered against her, and execution levied against her free separate estate, but not against that which was subject to the restraint. It is said that the same rule applies after the wife's death as before, and that satisfaction can only be obtained out of her separate estate other than that derived in any way from the property to which the restraint applies. On the other hand, it is argued that that is not so, because the wife has by her will directed payment of her debts. The point appears to be novel, but I think that argument is sound. A married woman possessing separate estate which she can dispose of by will can direct that her debts are to be paid out of that separate estate. I am not sure that precisely the same result would not follow without any such direction, and that the separate estate which she could dispose of by her will would not in any case be assets for the payment of her debts. But in this case there is a direction, and I think it clear that that makes it assets. I am of opinion also that any sum which might be recovered from her estate for damages and costs in an action on the covenant would be included in the debts directed to be paid.

The result is that, though the plaintiff is entitled to recover in the action the arrears of the annuity with costs, the defendant would be entitled to get back exactly the same sum and costs on the counter-claim.

It is not the practice of the Court to make useless orders, and

therefore there will be no order, except that the plaintiff pay the costs of the action and the counter-claim.

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Solicitors: *F. B. Moyle; Taylor, Hoare & Pilcher; Bridgman, Willcocks, Cowland, Hill & Bowman.*

J. R. B.

MILLAR & LANG, LIMITED *v.* POLAK.

NEVILLE J. 1907 *Dec.* 20.

[1906 M. 3184.]

Copyright—Drawings—Designs—Assignment of Copyright to intended Company—Registration—Validity of Assignment—Goods imported after, in Execution of an Order given before, Registration—Infringement—Injunction—Fine Arts Copyright Act, 1862 (25 & 26 *Vict.* c. 68), *ss.* 1, 4, 9, 11—*Patents, Designs and Trade Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *ss.* 47, 48, 60.

M., trading as M. & L., was the author of original drawings of designs for decorating Christmas cards. Dies of the drawings or designs were engraved, and from such dies copies or reproductions of the drawings or designs were struck off or stamped, generally in gold leaf, and were then affixed to the cards. In February, 1905, M. contracted with the trustee of an intended company, to be called M. & L., Limited, for the sale to the company, when incorporated, of his business and the copyright of his drawings and designs; and on March 1, 1905, M. signed an instrument whereby he assigned to M. & L., Limited, the copyright of all his drawings and designs. On March 3, 1905, the company was incorporated, and afterwards executed the usual adoptive agreement. In September, 1906, the company registered M.'s drawings or designs under the Fine Arts Copyright Act, 1862, and entered on the register March 1 as the date of their assignment, and M. & L. and M. & L., Limited, as the names of the parties thereto. In an action by the company against P. for infringing their copyright in the registered drawings:—

Held, that M.'s drawings or designs were proper subject-matter for registration as "drawings" under the Fine Arts Copyright Act, 1862, and that the copyright extended to the right of multiplying copies or reproductions of them by the method above stated.

Held, also, that for the purposes of the register March 1 was the true date of the assignment, and that the names of the parties thereto were truly stated, notwithstanding that the company did not come into existence until March 3.

Held, also, that the importation into the United Kingdom of copies of

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the drawings after registration, in pursuance of an order given before registration, was an infringement of the company's copyright and entitled them to an injunction.

ACTION.

For some years prior to 1905 George Grandison Millar carried on the business of an art publisher at Glasgow and in London under the style of Millar & Lang, and was largely engaged in the manufacture and sale of Christmas cards. He was the author and inventor of original drawings of designs for decorating Christmas cards. The drawings or designs were sketched in black and white on cardboard. Dies of these drawings or designs were then engraved, and from the dies numerous copies or reproductions of the drawings or designs were struck, generally in gold leaf, which were then affixed to or gummed on the Christmas cards. The drawings or designs were divisible into three classes—(1.) pictorial; (2.) pictorial with words added, such as "Greetings," "Friends ever," "Good luck," "Lest we forget," "For old times sake"; (3.) the words by themselves, or the capital letters of the alphabet, in a distinctive form within an ornamental oval or circular scroll.

The defendant was the agent at Manchester of one Hubner(1), a German manufacturer at Berlin, and at first the firm of Millar & Lang gave orders to the defendant for the dies they required to be engraved, and supplied him with the drawings for that purpose, which orders were executed by Hubner. But after a while the firm made their own dies, and after 1903 ceased to give the defendant orders for dies.

On February 28, 1905, George Grandison Millar entered into a contract with a trustee on behalf of an intended company, to be called "Millar & Lang, Limited," for the formation of the company and for the sale to the company, when incorporated, of the business, property, and assets of the firm of Millar & Lang as a going concern (exclusive of book debts) as from January 1, 1905, at the price and upon the terms therein mentioned; and on March 1, 1905, George Grandison Millar signed the following holograph assignment:—

"I George Grandison Millar, sole partner of the firm of

(1) *Sic* in the pleadings: *qu.* Hübner.

Millar & Lang, art publishers, Glasgow, do hereby assign to Millar & Lang Limited the two letters patent numbered 7931 and 7932 granted to me, the exclusive right to use the term 'National Series' being the copyright trade mark of my firm, and the copyright of all designs, drawings, and photographs which are being transferred to Millar & Lang Limited." But this document was not delivered to the company until after its incorporation.

On March 3, 1905, the plaintiff company was registered, and subsequently executed the usual adoptive agreement, under which the contract of February 28 was carried into effect, and George Grandison Millar became the managing director of the company.

In August, 1906, the company, finding that a number of their drawings or designs for Christmas cards were being extensively copied by the trade, sent a circular to the defendant and others warning them that actions would be brought against any publishers issuing any book of Christmas cards containing any patterns which were copies of their drawings or designs; and on September 11, 1906, the company registered at Stationers' Hall, under the Fine Arts Copyright Act, 1862, George Grandison Millar's drawings of designs for Christmas cards which they had acquired from the firm of Millar & Lang. The register contained a description of each drawing, the date of assignment to the company being given as March 1, 1905, and the names of the parties to the assignment being given as Millar & Lang and Millar & Lang, Limited, and the name and address of the company was given as the proprietor of the copyright, and the name and address of George Grandison Millar was given as the author of each drawing. Shortly afterwards the company discovered that the defendant, as agent for Hubner, had taken a large order from J. Brown & Sons, a Glasgow firm, for designs for Christmas cards which were copies of their registered drawings; and thereupon they commenced this action, alleging that the defendant had infringed their copyright drawings and claiming an injunction to restrain the defendant, his servants and agents, from manufacturing or otherwise producing, multiplying, circulating, or selling or exposing for sale any drawings, paintings,

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or photographs being copies, reproductions, or colourable imitations of the drawings (specifying them) in the register of proprietors of copyright in paintings, drawings, and photographs kept at Stationers' Hall, pursuant to the Act 25 & 26 Vict. c. 68, which drawings were entered by the plaintiffs in the said register as to those numbered (specifying them) on September 11, 1906, and as to the drawing No. 36,638 on September 15, 1906, and of which they claim the copyright as registered proprietors thereof, or of any of the said drawings, or of any part or parts thereof respectively, or from otherwise infringing or continuing to infringe the plaintiffs' copyright in the said drawings; and on December 14, 1906, the plaintiffs obtained an interim injunction until judgment in the action.

The defendant by his defence denied infringement of the plaintiffs' drawings, and alleged that such drawings were not duly registered under the Act, and that the entries on the register were invalid for the following reasons—(*a*) the same were not proper subject-matter for registration under the Act, and were copies or variations of designs applicable to articles of manufacture for the ornamentation of Christmas cards well known to and manufactured and sold by the trade for many years prior to the date of the alleged registration; (*b*) the plaintiffs had no assignment from G. G. Millar, the alleged author of the said designs; (*c*) G. G. Millar was not the author of the said designs.

The action now came on for trial, and it appeared from the evidence adduced by the plaintiffs that Millar was the author or inventor of the original drawings or designs from which the dies were engraved, and that after the designs were engraved the drawings were not required for any purpose and were destroyed; that the defendant was known to be an agent, and that he on September 7, 1906, received an order from J. Brown & Sons, of Glasgow, for 8000 copies of designs for Christmas cards, which were facsimiles or imitations of the plaintiffs' registered drawings, which order he at once transmitted to Hubner in Berlin, who executed the order and delivered the goods; and that on October 15, 1906, the defendant received a letter from J. Brown & Sons asking for a complete set of samples of oval initials (capital letters) "as per an enclosed rubbing," which was a copy

of one of the plaintiffs' registered drawings, and that he forwarded the order to Hubner.

Peterson, K.C., and *Gatey*, for the plaintiffs. An author who invents or designs an original drawing has the copyright of it so soon as he has produced it; but he cannot sue for any infringement until he has registered his copyright under the Fine Arts Copyright Act, 1862, nor can he sustain an action for anything done before registration. The first question, therefore, is whether the requirements of the Act have been complied with. (1) It has

(1) 25 & 26 Vict. c. 68, recites "whereas . . . . authors of paintings, drawings, and photographs have no copyright in such their works, and it is expedient that the law should in that respect be amended . . . .:"

Sect. 1: "The author being a British subject or resident within the dominions of the Crown, of every original painting, drawing and photograph which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death; . . . ."

Sect. 3 provides that all copyright under the Act shall be personal estate and shall be assignable at law, and that every assignment thereof shall be made by some note or memorandum in writing to be signed by the proprietor of the copyright.

Sect. 4 provides that a register shall be kept "wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this Act, and also of every subsequent assignment of any such copyright; and such memorandum shall contain a statement of the date of such agreement or assignment, and of the names of the parties thereto, and of the name and place of abode of the person in whom such copyright shall be vested by virtue thereof, and of the name and place of abode of the author of the work in which there shall be such copyright, together with a short description of the nature and subject of such work . . . . and no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration."

Sect. 6 imposes penalties on persons for infringement of copyright.

Sect. 9 provides that, in any action in any superior Court of record for the infringement of any such copyright, the Court may make an order for an injunction.

Sect. 10 prohibits the importation of pirated works.

Sect. 11: "If the author of any painting, drawing, or photograph, in which there shall be subsisting copyright, after having sold or otherwise

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been decided that it is not necessary to register the original owner of the copyright. It is sufficient if the proprietor and the assignment under which he becomes proprietor are duly registered: *Tuck & Sons* v. *Priester*. (1) It is submitted that these drawings are proper subject-matter for registration under the Act, and that the name of the proprietor and the date of the assignment and the names and addresses of the parties to the assignment are duly entered in the register. It will be objected that the company was non-existent on March 1, and that that date is not the true date of the assignment, but for the purposes of identification the date which an instrument bears is the correct date. A party can execute an assignment in favour of a company to be formed, as an escrow and on condition that the company is formed, and when the company is formed and the assignment delivered and the consideration paid the assignment is valid and effectual. It may be that the assignment did not operate, and the beneficial interest did not pass to the company, until the transaction was completed; but that is immaterial here. To identify a document entered on the register you look at the date of it, and for that purpose the date it bears is the true date, although for other purposes it may not operate until some time afterwards. Here, for the purpose of registration, March 1 is the true date of the assignment, and

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disposed of such copyright, or if any other person, not being the proprietor for the time being of such copyright, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied, for sale, hire, exhibition, or distribution, any such work or the design thereof, or the negative of any such photograph, or shall import or cause to be imported into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be sold, published, let to hire, exhibited, or distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of such work, or the design thereof, or the negative of any such photograph, made without such consent as aforesaid, then every such proprietor, in addition to the remedies hereby given for the recovery of any such penalties . . . . may recover damages . . . . against the person so offending . . . . provided that nothing herein contained, nor any proceeding, conviction, or judgment, for any act hereby forbidden, shall affect any remedy which any person aggrieved by such act may be entitled to either at law or in equity."

(1) (1887) 19 Q. B. D. 48, 629, 636.

the names of the parties to it are truly stated. Then on the evidence the defendant has since registration imported or caused to be imported these goods, or has offered or procured them to be offered for sale: *Tuck & Sons* v. *Priester* (1); and the plaintiffs are entitled to an injunction under ss. 9 and 11 of the Act.

Jenkins, K.C., and *Ward Coldridge*, for the defendant. We call no evidence, and submit that the plaintiffs' case fails. They have misconceived their rights. These drawings are not drawings in the sense intended by the Act of 1862. The scope and intention of that Act are explained in *Hanfstaengl* v. *Empire Palace*. (2) The Act is intended to protect works of art and copies of them which may be exhibited or sold. These drawings are no doubt novel and ingenious, but they are not works of art. The object was to sketch designs to be engraved on steel dies. When that was done the drawings had served their purpose, and were no longer of any use and were destroyed. The commercial value was not in the drawings, which were not intended for reproduction, but in the engraved dies. The drawings were really "designs" within the definition in s. 60 of the Patents, Designs and Trade Marks Act, 1883, and should have been registered under that Act. But ss. 47 and 48 of that Act require "designs" to be new and original at the date of registration, which these were not, because they had been sold and used in the trade for some years. To meet that difficulty the plaintiffs had recourse to the device of registering under the Act of 1862, but that does not help them.

[NEVILLE J. referred to *Maple* v. *Junior Army and Navy Stores*. (3)]

In that case drawings were protected as part of the copyright in an illustrated catalogue. They were not protected as drawings under the Act of 1862. A drawing, to be capable of registration under the Act, must have some merit as a work of art: *Kenrick & Co.* v. *Lawrence & Co.* (4) But even if these drawings are proper subject-matter for registration under the Act, there has been no infringement. In the first place, the fact that the plaintiffs were not incorporated until March 3

(1) 19 Q. B. D. 48, 629, 636.
(2) [1894] 2 Ch. 1.
(3) (1882) 21 Ch. D. 369.
(4) (1890) 25 Q. B. D. 99.

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invalidates the registration of the assignment of the copyright of March 1. We do not dispute that the plaintiffs, after its incorporation, obtained the benefit of the previous assignment; but that is not the point. Sect. 4 of the Fine Arts Copyright Act, 1862, requires that the date of the assignment and the names of the parties thereto shall be specified in the register. The date, we agree, is March 1, but there is but one party to the assignment, namely, Millar. The alleged assignee is the intended company. For the purposes of the register a non-existing person cannot take an assignment. Therefore the entry is misleading, inasmuch as it shews on March 1 that the proprietor of this copyright was the company, when on that date the company did not exist. In the next place, there has been no overt act by Polak since the registration on September 11, and he does not now threaten or intend anything. Moreover, the evidence does not prove that the order of September 7 was executed after September 11. It is only two days' post from Glasgow to Berlin and back, and the goods may well have been delivered before September 11. But if they were delivered after that date, Polak was not the offending party. He was merely the go-between. The parties who imported, or caused to be imported, these goods were J. Brown & Sons and Hubner. Also, there is no evidence that the order of October 15 was ever executed.

No reply was called for.

NEVILLE J. The principal question in this case is whether these things which have been registered under the Fine Arts Copyright Act are "drawings" which are properly registered so as to give the proprietor a copyright in them. I think they are. I think that these things which were registered were drawings. It is quite true that their value consisted, not in the use of the original drawings for exhibition, but for the multiplication of copies of the originals by a particular process, but I do not think that prevents the original drawings from being "drawings" which are capable of registration under the Act; and I think that the copyright may well extend to the right of reproducing and multiplying copies by one or more methods. In the case of *Hanfstaengl* v. *Empire*

Palace (1) Lindley L.J. says: "It was not meant to give them the right to restrain Madame Tussaud from exhibiting a representation of a painting in waxwork; but to restrain people from producing something which would compete in the market with the originals or with authorized copies of them." I think here that there are authorized copies of the original drawings which are of commercial value in respect of which copyright may well be claimed by the plaintiffs.

The next question I have to consider is whether the drawings were properly registered under the Act. I think that they were. It is true that the assignment of March 1, particulars of which are entered in the register under s. 4 of the Act, did not become operative until some days later than the actual date which it bears; but it seems to me that the conditions of s. 4 have been complied with, inasmuch as in this assignment the proprietor of the copyright is correctly stated; and the assignment under which the company became the proprietor is, I think, properly described, because the date which the assignment bears is given in the particulars of registration. I think that date is intended for the purpose of identifying the document, and I do not see that any other date could properly have been given at all.

The next question is whether the plaintiffs can maintain this action, the same section precluding them from bringing any action in respect of anything done before registration. Now here there are two matters complained of. The first is an order for some 8000 copies of certain of the drawings of the plaintiffs. The correspondence shews pretty clearly what took place with regard to that. I think there is no doubt that, as between J. Brown & Sons and Polak, Polak was acting as principal, although no doubt he placed the order which he had received, and for which he was paid, with a German manufacturer of the name of Hubner, who manufactured the articles in Berlin. I have no doubt that the bulk of that order was delivered after the date of registration under the Act. That, of course, is a matter of inference. But I feel no difficulty in drawing that inference,

(1) [1894] 2 Ch. 1, 6.

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particularly having regard to the fact that Polak has not been put into the box. It is hardly a mere question of how many hours the post takes between Berlin and Glasgow. I think the correspondence shews that that order was not an order which was going to be executed in a moment—it would require some little time to complete; and I have not the least doubt that the bulk of these goods were delivered after the date of registration, and in pursuance of the order of the defendant. I think, therefore, that with regard to this order he has caused the importation of these goods within the meaning of s. 11 of the Act. Then, with regard to the incident of October 15, I think the correspondence shews quite clearly that he was doing that which I hold to be an infringement of the copyright, and whether J. Brown & Sons were treating him as an agent or as a principal does not matter. He was associating himself, at all events, with an importation of these goods into this country. Whether they came or whether they did not I have no means of ascertaining. I have very little doubt that they did; but it seems to me quite immaterial, because for the purpose of an injunction the correspondence itself is sufficient. I hold, therefore, that the drawings were capable of registration, and were properly registered under the Act; that there has been infringement by the defendant since the date of registration; and that the plaintiffs are entitled to the injunction for which they ask.

Solicitors: *Ince, Colt & Ince; Daniell & Glover.*

H. L. F.

SARPY *v.* HOLLAND.

NEVILLE J.

1907

Dec. 18, 19, 21

[1907 S. 893.]

International Copyright—Foreign Musical Composition—Registration—Right of Public Performance reserved—Notice in French Language—Unauthorized Performance in England—"Wilfully" causing or permitting unauthorized Performance—Injunction—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 11, 20—*International Copyright Act*, 1844 (7 & 8 *Vict. c.* 12), *ss.* 5, 6—*Copyright* (*Musical Compositions*) *Act*, 1882 (45 & 46 *Vict. c.* 40), *ss.* 1, 2—*International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33), *ss.* 4, 6—*The Berne Convention*, 1887, *arts.* 2, 11—*Copyright* (*Musical Compositions*) *Act*, 1888 (51 & 52 *Vict. c.* 17), *s.* 3.

The registration of musical compositions required by the International Copyright Act, 1844, is in substitution for, and not in addition to, the registration required by the Copyright Act, 1842. Where, therefore, the proprietor of international copyright in a musical composition is, by virtue of s. 4 of the International Copyright Act, 1886, and the Berne Convention and the Orders in Council adopting the same, relieved from registration under the Act of 1844, registration under the Act of 1842 is unnecessary.

If the proprietor under international copyright of the exclusive right of public performance of musical compositions desires to retain it in this country, he must print, or cause to be printed, upon the title-page of every copy published in this country the notice reserving such right required by s. 1 of the Copyright (Musical Compositions) Act, 1882, and such notice must be printed, not in a foreign language, but in English.

Where the proprietor, tenant, or occupier of any place of entertainment, at which an unauthorized performance of a musical composition takes place, does not "wilfully cause or permit such unauthorized performance knowing it to be unauthorized," he is by virtue of s. 3 of the Copyright (Musical Compositions) Act, 1888, not liable to any penalties or damages in respect thereof; and in such a case an injunction will not be granted against him unless he threatens and intends to continue the performance.

ACTION.

This was an action for an injunction to restrain the defendants from performing, or permitting to be performed or represented, certain musical compositions, or any of them, under these circumstances.

The plaintiff was the agent-general for the British Empire of

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the Société des Auteurs, Compositeurs et Editeurs de Musique, and had acquired by purchase from the authors and composers thereof the copyright, and sole right of representing or performing, in Great Britain and its dependencies, of certain pieces of music, viz., "Amoureuse," "La réponse à Amoureuse," "La faute des roses," "Petite annonce," "Quand l'amour meurt," "Sorella," and "Paris marche." The authors and composers of all these pieces of music were foreigners; and all the pieces had been first published in France after December, 1887, and the said authors and composers were entitled to the sole right of representing or performing the said pieces of music in France, all the laws of France with respect thereto having been complied with.

The defendant Holland was the lessee of an hotel at Cricklewood, which had a large saloon lounge. The co-defendant Savage was a violinist and the leader of a band of four musicians, and had for some three years been employed to play three evenings a week in the saloon by Holland, who paid him 16*s.* for each evening. In all other respects the entertainments were free and gratuitous, and Holland left the selection of the music that was played entirely to Savage.

The plaintiff commenced the action on March 11, 1907, and by his statement of claim alleged that the defendant Savage had performed, and the defendant Holland had wilfully caused or permitted to be performed or represented, without the consent of the plaintiff and knowing them to be unauthorized, all the said musical compositions on certain dates in January and February, 1907; that "Sorella," "Paris marche," and "Quand l'amour meurt" were contained in a musical composition called "Cosmopolitan Lancers," which was performed on some of the given dates; that the defendants intended to continue the unauthorized representation; and he claimed an injunction as above stated.

The defendants by their defence traversed the allegations of the plaintiff, and pleaded, in the alternative, that no notice was printed on the title-page or commencement of any of the said pieces (except the "Cosmopolitan Lancers") to the effect that the right of public representation or performance was reserved, or, if there were any such notices, the same were in the French

language, which they respectively did not understand; and they relied on the provisions of the Copyright (Musical Compositions) Act, 1882, and the Berne Convention and the Acts and Orders in Council making it applicable to the United Kingdom; and they also pleaded leave and licence to perform all the said pieces at entertainments which were free and gratuitous. The action now came on for trial.

It appeared that the "Cosmopolitan Lancers" bore the following notice in English:—

> "This composition may be performed without fee at any entertainments which are absolutely free, otherwise permission must be obtained from the Société des Auteurs, 32 (1), Shaftesbury Avenue."

And each of the pieces "Amoureuse," "La réponse à Amoureuse," "Petite annonce," and "La faute des roses" bore the following notice in French:—

> "Tous droits d'édition d'exécution publique de reproduction et d'arrangement réservés pour tous pays y compris Suède Norvège et Danemark."

And the following notice in English:—

> "This composition may be performed without fee at any entertainments which are absolutely free, otherwise permission can be obtained on payment in advance of 1*s.* per performance to the British Agency General of the Société, &c., 16 (1), Shaftesbury Avenue."

There was evidence that the plaintiff in December, 1906, on hearing that his pieces were being performed at the hotel, sent the defendant Holland a circular by registered post which was said to give notice of the plaintiff's rights; but the Court held that under the circumstances the circular did not operate as an effective notice, and the defendants proved that, when their attention was clearly drawn to the plaintiff's rights on March 8, 1907, by communications from solicitors, they at once stopped the performance of the plaintiff's pieces.

Scrutton, K.C., Lush, K.C., and *Martelli*, for the plaintiff. Under arts. 2, 4 and 9 of the Berne Convention of September 5,

(1) *Sic.*

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1887 (1), which was adopted by an Order in Council dated November 28, 1887, and ss. 6 and 11 of the International Copyright Act, 1886, the plaintiff is entitled to the benefit and protection of all the English International Copyright Acts, and registration under the International Copyright Act, 1844, is by s. 4 of the Act of 1886, rendered unnecessary: *Hanfstaengl* v. *American Tobacco Co.* (2) All the conditions of the laws of the country of origin having been complied with, the plaintiff is entitled to the same rights in this country as in the country of origin. There is nothing in the Berne Convention or the English International Copyright Acts that requires the notice reserving the right of performance to be in English. It may be that under the circumstances the defendants are by s. 3 of the Copyright (Musical Compositions) Act, 1888, relieved from damages and penalties, but that does not disentitle the plaintiff to an injunction to protect his rights.

Clayton and *F. FitzGerald*, for the defendant Holland. In accordance with art. 9 of the Berne Convention and s. 1 of the Copyright (Musical Compositions) Act, 1882, there ought to be on the title-page of each piece of music a notice in English

(1) By art. 1 of the Berne Convention of September 5, 1887 (adopted by Order in Council dated November 28, 1887), the contracting States (including France) were constituted into a union for the protection of the rights of authors over their literary and artistic works.

Art. 2 (as modified by the Additional Act of Paris of May, 1896, adopted by Order in Council dated March 7, 1898): "Authors belonging to any of the countries of the Union, or their lawful representatives, shall enjoy in the other countries for their works, whether unpublished, or published for the first time in one of those countries, the rights which the respective laws do now or shall hereafter grant to nationals."

Art. 4: The expression "literary and artistic works" comprehends (inter alia) musical compositions.

Art. 9: "The stipulations of Article II. apply to the public representation of dramatic or dramatico-musical works, whether such works be published or not.

"Authors of dramatic or dramatico-musical works, or their lawful representatives, are during the existence of their exclusive right of translation, equally protected against the unauthorized public representation of their works.

"The stipulations of Article II. apply equally to the public performance of unpublished musical works, or of published works, in which the author has expressly declared on the title-page or commencement of the work that he forbids the public performance."

(2) [1895] 1 Q. B. 347.

to the effect that the right of public representation or performance is reserved. In the case of all the pieces, except the "Cosmopolitan Lancers," the notice is in French. That, however, is not a sufficient compliance with the provisions of either the statute or the Convention. It must be in the language of the country in which the copyright is claimed. The object of the notice is to protect innocent persons, but that object is defeated if the notice is given in a language they do not understand: *Fuller* v. *Blackpool Winter Gardens and Pavilion Co.* (1) As to the "Cosmopolitan Lancers" the notice is in English, but goes on to say that the piece may be performed without fee at any entertainments that are absolutely free. These entertainments were free and gratuitous. Therefore the performance was permissible. Next, there is no evidence that Holland was "wilfully causing or permitting" the performance of these pieces of music. He was ignorant of the French language, and, moreover, he left the choice of music entirely to Savage, and was in no sense responsible for the pieces that were played. The analogy of *Somerset* v. *Wade* (2) applies. Further, there has been no registration under the English Copyright Acts. Registration was certainly necessary under the old International Copyright Act, 1844 (7 & 8 Vict. c. 12), s. 6: *Wood* v. *Boosey.* (3) Under the Berne Convention the point was raised, but not decided, in *Hanfstaengl* v. *Empire Palace.* (4) In *Hanfstaengl* v. *American Tobacco Co.* (5) it was held that registration under the Fine Arts Copyright Act, 1862, was not necessary in order to entitle the owner of the English copyright in a foreign painting to sue for infringement. But there has been no decision as to musical compositions, and it is submitted that registration was at any rate necessary under ss. 4 and 11 of the Copyright Act, 1842. Lastly, the defendants do not threaten or intend to continue the performance of the plaintiff's pieces, and therefore there is no case for an injunction.

Strachan, K.C., C. Bray, and *G. H. Couch,* for the defendant Savage, adopted the same line of argument. The compositions were first published in France, and, admitting that all the

(1) [1895] 2 Q. B. 429.
(2) [1894] 1 Q. B. 574.
(3) (1868) L. R. 3 Q. B. 223.
(4) [1894] 3 Ch. 109.
(5) [1895] 1 Q. B. 347.

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requirements of the laws of France had been complied with, the evidence shews that the plaintiff contemplated a sale in England. Therefore, if he wished to protect his copyright and reserve to himself the exclusive right of public performance in England, he must comply with the requirements of the statutes of this country in that respect. The Copyright (Musical Compositions) Act, 1882, was passed to protect the public from vexatious proceedings for infringements of copyright, and s. 2 of that Act required that a notice reserving the right of public performance shall be printed on the title-page of every published copy. That notice must be a notice which clearly brings to the knowledge of the public in England the right that is reserved. Therefore it must be a notice in the English language. If a notice given in French is good, a notice given in any other foreign language would be equally good. The plaintiff has therefore failed to comply with the requirements of the statute, and has no remedy. Further, the performance was stopped on March 8, and there is no intention to continue, and therefore no case for an injunction.

[*Scrutton, K.C.*, asked for leave to put in evidence copies of the musical pieces with the notice thereon in English.

NEVILLE J. I think it would not be right to admit this evidence now after the evidence has been closed, and the case and the arguments have proceeded throughout from first to last up to reply on the footing that the notice was in French. I therefore exclude the evidence.]

Scrutton, K.C., in reply.

Cur. adv. vult.

Dec. 21. NEVILLE J. The defendant Holland is the tenant of the Crown Hotel, Cricklewood. He engaged the defendant Savage to provide a band of musicians to perform in the saloon bar of his hotel three nights a week, the terms of payment being 16*s.* a night. The defendant Savage provided a pianist and two other musicians besides himself. There was no programme of the performance, but the pianist provided the music, and such pieces were played as fancy or the music at the band's disposal on the particular occasion dictated. The plaintiff, in consequence of information which he received, sent agents to attend

the performances, and their evidence is that the music mentioned in the statement of claim was on one or more occasions performed. This is, I think, correct except with regard to the performance of "Quand l'amour meurt," as to which I think they were mistaken. I find upon the facts that neither of the defendants were aware that there was anything wrong, if anything wrong there was, in what they did; and that the defendant Holland, as soon as his attention was sufficiently called to the plaintiff's claim, forbade the further performance of the music objected to. Upon these facts I hold that Holland did not wilfully cause or permit an unauthorized performance knowing it to be unauthorized. This would, in my judgment, be sufficient to dispose of the action so far as Holland is concerned, for I think no injunction should be granted against a proprietor in cases where s. 3 of the Act of 1888 relieves him from liability to any penalty or damages. The right of performance of the music in question is vested by the law of France in persons who are sufficiently represented by the plaintiff. With regard to the "Cosmopolitan Lancers," however, he claims only on account of two compositions, some bars of each of which are introduced in the arrangement. These two compositions, for the purposes of my judgment, I treat as standing on the same footing as the rest. The music the performance of which is complained of bears upon its title-page certain words which the evidence shews to be in the French language, and to mean, amongst other things, that the rights of public performance are reserved. I am, therefore, of opinion that art. 9 of the Berne Convention ensures to these musical works the benefit of art. 2. This article, as subsequently modified in 1897, gives to authors belonging to any one of the countries of the union the rights which the respective laws "do now or shall hereafter grant to nationals," subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work. This brings me to the principal point in the case—namely, whether the provisions of s. 1 of the Act of 1882 apply to a proprietor of the right of public performance claiming in this country under the International Convention. The construction of this section has been considered in *Fuller* v. *Blackpool Winter Gardens and Pavilion*

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Co. (1), where A. L. Smith L.J. says: "What is the meaning of the words 'if the owner of the right of public representation or performance (of any musical composition) shall desire to retain the same he shall . . . . print upon every copy of such musical composition a notice to the effect that the right of public representation or performance is reserved'? Do they mean that he shall retain the right and be able to sue whether he has the notice printed or not? Or do they mean that he shall only retain the right and be able to sue if he carries out the enactment and prints and gives notice to the world of the reservation? The latter, in my judgment, is the true reading of this enactment; and if it were construed otherwise as regards this most important matter, it might just as well have never been placed in the statute-book." If a national, therefore, would retain the right of public performance, he can only do so upon the terms of giving the required notice. But it is argued that by force of the Convention a foreigner is put in a better position, and that, having accomplished the conditions prescribed by the law of the country of origin, he is free to exercise the rights which the laws of his country give to nationals unfettered by any conditions or restrictions under which the nationals exercise such rights. I cannot so hold. In my opinion legal rights must be exercised in this country by nationals and foreigners alike in conformity to the obligations attached to them. Fulfilment of the terms of the Convention is a condition precedent to the acquisition of copyright for foreign publications; but the rights so acquired must be exercised in accordance with the law of the land. It is said that the decision of the Court of Appeal in *Hanfstaengl* v. *American Tobacco Co.* (2) is contrary to this view. I do not think so. In my opinion the registration required by s. 6 of the International Copyright Act of 1844 was in substitution for, and not in addition to, the registration required by s. 11 of the Act of 1842, and from the former the owners of international copyright were specially exempted by s. 4 of the Act of 1886 except so far as provided by the Order. This is all, in my opinion, that the case in question decides. It is to be noted that if the true interpretation of the Convention is that

(1) [1895] 2 Q. B. 429, 441. (2) [1895] 1 Q. B. 347.

international copyright is in return for reciprocal accommodation granted, subject only to the fulfilment of the laws of the country of origin and freed from the conditions necessary for its exercise on the part of nationals in the country of enjoyment, the Act of 1886 would itself be a breach of the Convention, for it retains the obligation to register in certain cases. I come, therefore, to the conclusion that, if the owner under international copyright of the exclusive right of public performance of musical compositions desires to retain it in this country, he must print upon the title-page of every published copy the required notice. It has then to be considered whether the notice is properly given if printed in a foreign language—be it the language of the country of origin or otherwise. In my opinion every notice required by English law must be given in the English tongue unless there has been some Act of Parliament otherwise directing. I find no such provisions in the Act in question ; and I think to hold that the notice required for the protection of the public might be well given in any of the languages of the numerous countries within the Convention would be to reduce the protection given by the Legislature to a mockery so far as international copyright is concerned. Counsel for the plaintiff, at the commencement of his reply, applied for leave to adduce further evidence to shew that the notice required had, in fact, been given in English; but as such evidence, if given, would have flatly contradicted the evidence of the plaintiff himself, and would have been inconsistent with the case presented to me, from opening to reply, I refused the application. The plaintiff's case fails; and the action must be dismissed with costs.

Solicitors: *Stanley, Woodhouse & Hedderwick; Boulton, Sons & Sandeman; Crawshay & Caldicott.*

H. L. F.

PARKER J.

1907

Dec. 11.

In re SIMMONS' CONTRACT.

[1907 S. 3279.]

Solicitor—Costs—Vendor and Purchaser—Scale Fee—Deducing one Title on several Contracts—Solicitors Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *s.* 4—*General Order, Sched. I., Part I., r.* 8.

Five leases of five separate houses were granted by the same lessors on the same day to the same lessee, to whom each lease gave an option of purchasing the fee simple, in which case he was to pay all legal and other expenses of the lessors as vendors, it being stated that the intention of the parties was that the lessors should be put to no expense in respect of the conveyance.

The lessee by one letter exercised each of the five options, received only one abstract of title, and required only one conveyance of all the five houses. The vendors' solicitors declined to allow all the houses to be conveyed by one deed except on the terms that they should not be deprived of any part of the costs under the leases, and claimed to charge in respect of each house the scale fee for "deducing title and perusing and completing conveyance":—

Held that, as there had only been one deducing of title, a scale fee in respect of each house could not be charged.

In the year 1897 Charles Henry Simmons and Henry Mandy Simmons entered into five written contracts to grant five several leases of five plots of land at Eastbourne.

In pursuance of these contracts C. H. Simmons and H. M. Simmons granted five several leases, dated respectively June 5, 1899, of the same five plots to the Eastbourne Artisans' and Labourers' Improved Dwellings Company, Limited, for five terms of ninety years each from September 29, 1897.

Each lease contained a covenant by the lessors that they would within ten years from September 29, upon the request of the lessees, convey to them the fee simple and inheritance of the premises thereby demised upon payment by the lessees to the lessors of a certain fixed sum, and also contained the following provision:—

"And it is hereby agreed that in the event of the said premises being purchased under the agreement hereinbefore

contained the following provisions shall apply—First, within twenty-one days after receipt of notice as aforesaid the lessors will if required deliver to the lessees or their solicitors an abstract of their title to the premises commencing with an indenture of conveyance," dated October 10, 1848, and made between certain persons, "but the purchasers shall not be entitled to make any objection to or requisition in respect of the title or to require any evidence as to the identity of lot or lots purchased by them. Secondly, the lessees shall pay all legal and other expenses of the lessors as vendors, it being the intention of the parties hereto that the lessors shall be put to no expense whatever in respect of the said conveyance, and the lessees shall also pay all expenses (if any) incurred by the lessors in the investigation of the title of the party requiring the conveyance."

In July, 1900, H. M. Simmons conveyed his interest in all the premises to C. H. Simmons.

Each of the five options to purchase was exercised by the company on May 17, 1907, by a letter from the company's solicitors to the solicitors of C. H. Simmons of that date, which concluded as follows: "We shall be glad to hear from you accepting this letter as notice to your client and with an abstract of title."

On July 24 C. H. Simmons' solicitors sent one abstract of the title to the land comprised in the five leases. The five plots were all part of one piece of land to which the title was shewn.

On September 4 the company's solicitors sent to the vendor's solicitors a draft of one conveyance of all the five plots. In their reply, dated the following day, the vendor's solicitors said: "We note you wish to take up the five plots in one conveyance. If we agree to this, it must be on the understanding that such an arrangement does not deprive us of any part of the costs provided for by the building agreement."

On the same day the company's solicitors verbally offered the vendor's solicitors the sum of 7*l.* 10*s.* (said to be the scale fee on one conveyance of all the plots, the total price for which was 496*l.* 10*s.*) in discharge of their costs; but this offer was refused by the vendor's solicitors, who claimed the sum of 25*l.*, namely, 5*l.* in respect of each plot.

On September 19 the company issued against C. H. Simmons

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a summons under the Vendor and Purchaser Act, 1874, for a declaration that the vendor was not entitled under the contract or contracts in the leases to insist upon the plots being conveyed by five separate conveyances, or upon the company being charged with costs estimated upon the footing of the plots being so conveyed.

After the summons was served the vendor delivered four other abstracts.

E. P. Hewitt, for the purchasers. In *Earl of Egmont* v. *Smith* (1) Jessel M.R. held that a vendor could not object to convey to a purchaser in parcels by separate conveyances at one and the same time, if so required by the purchaser; and said: "An ordinary contract of sale is not only to convey to the purchaser, but to convey as the purchaser shall direct." The purchasers here are entitled to require all the plots to be conveyed by one deed.

By Sched. I. (Part I., r. 8) to the order under the Solicitors Remuneration Act, 1881, "Where the prescribed remuneration would, but for this provision, amount to less than 5*l.*, the prescribed remuneration shall be 5*l.*, except on transactions under 100*l.*" The fee under the scale in the same part of the same schedule is, "Vendor's solicitor for deducing title to freehold . . . . property and perusing and completing conveyance," for the first 1000*l.*, 30*s.* per 100*l.*, which would make the fee in this case something not exceeding 7*l.* 10*s.* But the vendor's solicitors want to split the purchases into five, so as to charge five times for doing what they have only done once, namely, deducing the title.

[PARKER J. The vendor's solicitors are not parties to the proceedings.]

The point can be decided without their being actually parties. They can only charge the scale fee when the whole of the business in respect of which it is unpaid has been done, namely, deducing the title and completing the conveyance: *In re Lacey & Son.* (2) The title has not in this case been separately deduced in the case of each plot.

(1) (1877) 6 Ch. D. 469, 474. (2) (1883) 25 Ch. D. 301.

A. Whitaker, for the vendor. The vendor's solicitors are willing that the point shall be decided on the present application. Their contention is that there were five separate contracts—by each of which the purchaser agreed to pay the costs and take a conveyance—and five separate sales under the contract. Under these circumstances r. 8 of Sched. I., Part I., is applicable, and there is a minimum fee of 5*l.* on each sale.

[PARKER J. referred to *In re Margetson and Jones.* (1)]

Hewitt in reply.

PARKER J. This case arises on a summons under the Vendor and Purchaser Act, 1874, but really the point involved is as to the right of a vendor's solicitors to charge the scale fee, under the order made under the Solicitors Remuneration Act, 1881, in respect of what are in effect five contracts for the sale of five different houses. By five different leases of the same date five separate houses were demised by the same lessors to the same lessee, and each lease contained an option for the lessee to purchase the freehold subject to certain conditions. One of those conditions was that the lessee should "pay all legal and other expenses of the lessors as vendors, it being the intention of the parties hereto that the lessors shall be put to no expense whatever in respect of the said conveyance." In this particular case no question arises as to the right of the lessee to exercise the option to purchase. Each of the options was exercised on the same day, and the exercise of each option gave rise in respect of each house to a separate contract for the purchase of the house by the lessee. The lessors' title to all the houses being the same, the lessee required and obtained one abstract of title only, and, although requisitions and objections were not allowed by the contracts, the lessee did make some requisitions which in due course were answered. A single conveyance of the whole five houses was prepared and is, I am told, ready for execution, and there is nothing to lead to the suggestion that it is against the vendor's interest that there should be only one conveyance and not five separate conveyances.

But apparently the vendor's solicitors thought that if there

(1) [1897] 2 Ch. 314.

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was only one conveyance instead of five, it would prejudice their right to payment of a scale fee in respect of each of the five contracts. As to there being one conveyance, that will, in my judgment, make no difference as to the scale fee, for in such a case as this the vendor's solicitors cannot charge, as against their own client, the vendor, five scale fees.

It was long ago settled that a scale fee is only chargeable if all the work in respect of which it is payable has substantially been done; and it is perfectly certain that in the present case there has been only one deducing of the title, one abstract, and one set of requisitions to be answered, and I cannot see how, in these circumstances, the vendor's solicitors can possibly charge five times, according to the scale fee, for the same work.

There may be some question as to how the charges of the vendor's solicitors for the work actually done by them are to be fixed, but the purchaser offers to pay the sum of 7*l.* 10*s.* as one scale fee on the whole transaction, as if the property had all been comprised in one contract. On the other hand, it may be that strictly the vendor's solicitors can charge one scale fee in respect of one house, taking the minimum scale charge of 5*l.*, and can also charge extra costs in respect of the other houses under a different scale of charge, but in no case would the total amount come to more than 7*l.* 10*s.* It seems unnecessary, therefore, to go into the way in which a taxing Master would deal with the matter.

The truth is that the vendor's solicitors, and possibly the vendor, have read the contract in the leases in a way in which I do not think it can be properly read. It is not a covenant to pay a certain sum to cover the expense of the conveyance, but merely a contract to indemnify the vendor against costs which he would or might otherwise be bound to pay his own solicitors for carrying out the sale.

I am therefore thrown back on the decided cases on the rules applicable to costs, and, having regard to them, I hold that the solicitors can at most charge one scale fee in respect of the sale of the five houses.

The summons therefore succeeds, and, the vendor's solicitors appearing, and submitting to be bound by my decision, I hold

that they cannot charge a separate scale fee for each house, but are only entitled to treat the whole property as subject to one contract and to charge one fee in respect of the whole.

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Solicitors for purchasers: *Ford, Lloyd, Bartlett & Michelmore, for Hillman & Burt, Eastbourne.*

Solicitors for vendor: *Tippetts, for Coles, Sons & Tilburn, Eastbourne.*

F. E.

MAYOR, ALDERMEN, AND BURGESSES OF TENBY *v.* MASON.

[1907 T. 366.]

C. A.
1907
KEKEWICH J.
Nov. 14, 22.
1908
C. A.
Jan. 21.

Municipal Corporation—Council Meetings—Right of Public to attend—Burgess—Newspaper Reporter—Right to exclude—Injunction—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 233; *Sched. II., r.* 5.

In a municipal borough neither the public, nor the burgesses, nor reporters for newspapers, have the right to attend the meetings of the borough council without the consent of the council expressed or implied.

Decision of Kekewich J. affirmed.

Semble, the same principle applies to the meetings of a district council or of a county council.

WITNESS ACTION.

The plaintiffs were the mayor, aldermen, and burgesses of the borough of Tenby, who, by virtue of the provisions of the Municipal Corporations Act, 1882, acted by the council of the borough of Tenby. The council held meetings for the purpose of carrying on the business and discharging the duties of the plaintiffs, and these meetings were held in private, and usually in the council chamber at the town hall, which was the property of the plaintiffs.

The defendant was the proprietor of a local newspaper called the *Tenby Observer*, and was also a ratepayer and burgess of the borough of Tenby.

At a meeting of the council on November 20, 1895, it was duly resolved "that the representatives of the Press be admitted

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to all council and committee meetings subject to the right of any council or committee meeting to exclude such representatives on any occasion"; and at a meeting of the council on January 11, 1897, it was duly resolved "that reporters be not admitted to the council meetings unless they publish true, authentic, unbiassed and impartial reports of the proceedings of such meetings."

At a meeting of the council on December 14, 1904, it was duly resolved "that reporters be in future excluded from all committee meetings, but that they be allowed to inspect the minutes of meetings and publish the same if desired."

Notices of intended meetings of the council were always exhibited some days previously at the town hall, and were also sent to the councillors, officers, and servants of the council, and it had been the practice to send similar notices to four newspapers representative of the local Press, including the *Tenby Observer*, and these notices were always accompanied by a further notice of the business to be transacted at the meeting.

On January 21, 1907, the defendant, owing to the absence of his usual reporter, attended a meeting of the council, notice whereof had been left at the office of the *Tenby Observer*, and published a report of the meeting in his paper of January 24, 1907. The defendant was not an expert shorthand writer, and the report, although substantially accurate, was not a verbatim report of the proceedings. In consequence of this report the council resolved at a meeting held on February 25, 1907, that the defendant should not be permitted to attend again personally as reporter to his own newspaper until he proved himself to the satisfaction of the council an efficient shorthand writer, but that that should not prevent him from sending a properly qualified person to report meetings as theretofore. The defendant then wrote to the town clerk saying that he proposed to attend the next meeting of the council, and on March 1 the town clerk sent to the defendant a copy of the resolution passed on February 25.

At the next meeting, on March 11, 1907, notice whereof had been sent to the office of the *Tenby Observer* in the usual way, the defendant entered the council chamber, and refused to leave

it when requested by the mayor on behalf of the council, and persisted in being present at the meeting.

The plaintiffs thereupon commenced this action, alleging that it was necessary that the council should, in order to carry on the business and discharge the duties of the plaintiffs, be able to meet in private, and claiming—(1.) a declaration that the council had a right to exclude all persons not members of the council from the meetings of the council; and (2.) an injunction restraining the defendant, so long as he was not a member of the council, from trespassing on the plaintiffs' property and from entering the council chamber during, and from being present at, meetings of the council without the permission of the council. The plaintiffs also claimed a similar declaration and injunction with regard to meetings of the committees of the council.

The defendant in his defence claimed a right to be present at the meetings of the council without the permission of the council or of the plaintiffs, and claimed such right as a ratepayer of the borough, or as a reporter of the *Tenby Observer*, and, in the alternative, that the meetings of the council were public meetings at which he was entitled to be present as a member of the public.

The action came on for hearing before Kekewich J. on November 14, 1907.

P. O. Lawrence, K.C., and *A. A. Bethune*, for the plaintiffs. The only persons entitled to be present at the meetings of the council are the mayor, aldermen, and councillors, and there is nothing in the Municipal Corporations Act, 1882, giving to any other person the right to attend. The burgesses and ratepayers have certain rights of inspection of the minutes of proceedings of the council and of the treasurer's accounts under s. 233 of the Act, but no right to attend meetings of the council is given to them.

The claim to attend as a reporter for the newspaper is made under the resolutions of the council, but these cannot give any right, or bind the council to admit reporters to the meetings, or debar them from revoking any invitation that may have been issued.

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The claim as a member of the public is grotesque. If it were allowed it would mean that any person, although having no interest whatever in the borough, could go there and claim a right to be present at the meetings of the town council. Manifestly there would be many discussions at which the presence of the public would cause grave inconvenience, and the only practical way for the council to conduct their business is for them to have the right to admit or exclude the public as they think fit.

Jessel, K.C., and *Ellis J. Griffith*, for the defendant. The defendant does not claim the right to attend the committee meetings of the council, but he claims to be entitled to attend the council meetings as a burgess or ratepayer of the borough. He also claims the right to attend as the representative of the *Tenby Observer*, and on this point the question is whether, when a notice has been sent by or on behalf of the plaintiffs to the offices of a newspaper inviting the newspaper to be represented at a meeting of the council, the plaintiffs can exclude a particular person on the staff of the newspaper from the meeting. We submit that they cannot. In the first place, it has long been the established practice of the council to have representatives of the Press, including the *Tenby Observer*, present at the meetings of the council, and the defendant is entitled to attend on behalf of his paper. Moreover, the plaintiffs invited a representative of the *Tenby Observer* to attend, and they are now seeking an injunction to restrain the repetition of a trespass by the defendant, who went there on the plaintiffs' own invitation. Again, under the provisions of the Municipal Corporations Act, 1882, the council may make standing orders for the regulation of their business, and in the present case there is a resolution, having in reality the force of a standing order, that representatives of the Press be admitted. It is not, therefore, open to the council to say that on any one particular occasion a certain reporter shall be excluded, and we submit that they cannot properly exclude him so long as the resolution remains unrevoked.

Thirdly, the defendant claims the right as a member of the public, and under this head we submit that the council meeting

should be open to the public subject to there being room for them.

The meetings of a town council are analogous to the meetings of a parish council, and by r. 13 of the second part of the First Schedule to the Local Government Act, 1894 (56 & 57 Vict. c. 73), every parish council meeting is open to the public unless the council otherwise direct. By the 5th rule of the Second Schedule to the Municipal Corporations Act, 1882, it is made obligatory for notices of meetings to be posted in the town hall. This rule cannot be intended for the benefit of the members of the council, because separate notices have to be sent to them, but it must be for the information of the public and to enable them to attend if they please, for it is of the greatest importance that the ratepayers should know what is being done at these meetings. These are public meetings held for public purposes, and the public ought not to be excluded. In *Pittard* v. *Oliver* (1), a case relating to meetings of a board of guardians, Lord Esher seems to have considered that the ratepayers were so much interested that they had a right to be present at such meetings. While we do not contend that the public must be admitted on all occasions, we nevertheless submit that, as a general rule, the public may attend such meetings, and if that be so, then the plaintiffs are not entitled to discriminate and exclude any one person. The general right is not prejudiced by the power to close on occasions: *Purcell* v. *Sowler*. (2)

On the broad question it is enough if the Court holds that the public are entitled to be admitted, without saying whether or not the corporation have any right to exclude the public.

P. O. Lawrence; *K.C.*, in reply.

Cur. adv. vult.

1907. Nov. 22. PARKER J. read the following judgment for KEKEWICH J.:—The question for decision is whether the defendant is entitled in any character as a matter of right to attend the meetings of the council of the borough of Tenby. He claims to be thus entitled in three different characters which must be separately treated.

(1) [1891] 1 Q. B. 474, 477. (2) (1877) 2 C. P. D. 215, 219.

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First, he says he is entitled in his character of a burgess of the borough. In his defence he claims the right as a ratepayer, but he really means as a burgess, and it is admitted that he fills that character. No argument was addressed to me in support of this claim, and it may be passed by without further remark.

Secondly, he claims the right as the representative of a newspaper, the *Tenby Observer*, that is, as the reporter for that paper of the proceedings of the council. It is extremely difficult to understand the foundation of this claim, but it was seriously argued, and must therefore be noticed. It was said that it has been the practice of the council to admit reporters, and that is true, but I fail to see how any right can be rested on that. Next, attention was called to the resolutions of the council in favour of the admission of reporters, which were relied on as equivalent to standing orders, to the benefit of which the defendant says he is entitled. The answer is that the council which makes can also unmake standing orders, and that in the meantime they, however binding on the council, cannot confer rights on strangers.

It seems to have been the practice to give notice to the newspapers of the borough, not only of intended meetings of the council, but of the business to be transacted thereat, and it is admitted that this has been done in order to assist the newspapers to report the proceedings, and for that purpose to send representatives to the meetings. Such a representative might well be surprised if, on attending a meeting to which he had been thus invited, he were refused admission. But surely the council which issued the invitation is entitled to withdraw it. There is no room for contract, and without contract I do not see how any right can be established.

Thirdly, the defendant claims to be entitled to attend the meetings of the council as one of the public, that is, he alleges that they are necessarily public meetings. I pass over without further notice the evidence that the door leading to the council room has remained open during the time of meeting, and there has been no doorkeeper to challenge the entrance of any one not coming in an official character, as also the evidence, which is by no means strong, that occasionally some such persons may have entered and attended the meetings. The only arguable

ground of this claim is that they are public meetings. The first observation on this is that we are dealing with the creature of statute, and that there is no room for the application of the common law on which one would fall back if dealing with, for instance, vestries: see Steer's Parish Law, 5th ed. p. 195.

The borough council is constituted under the Municipal Corporations Act, 1882, and if the defendant's claim is well founded there must be expressed in, or reasonably inferred from, that Act a right on his part as one of the public to attend the meetings. Admittedly there is no expression of any such right. Can it be reasonably inferred? The defendant endeavours to answer this affirmatively. Of those provisions of the statute, including the rules set out in the Second Schedule, which ensure some publicity of the proceedings of the council, none of them really affects the public except the 5th rule, which provides for notice of the time and place of intended meetings being fixed on the town hall, and if the meeting is called by members of the council the notice must also state the business proposed to be transacted. Giving the utmost possible weight to these provisions, I cannot deduce therefrom any intention on the part of the Legislature that the public shall have a right to be admitted to the meetings; and indeed I should infer that this is the limit of publicity which it was thought desirable to ensure, and that no more was contemplated.

Something was said, and a good deal might be said, about the inconvenience of making such meetings public, but I will say no more about that than this: I can find no reason in the character or constitution of the meetings, or in the nature of the business to be transacted thereat, which would justify the conclusion that they must necessarily be public.

Reference was made to the Local Government Act, 1894, which provides in the second part of the First Schedule, r. 13, that every meeting of a parish council shall be open to the public unless the council otherwise direct. Assuming this to be a provision touching a council of a similar character to a borough council—and unless that assumption is made the allusion is not apposite—I think that the only inference from it is that where the Legislature has not thus enacted no enactment was intended.

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I do not think that the cases cited throw any light on the subject. They were not concerned with any such question as is now under consideration, and they may be dismissed with the general observation that isolated passages in judgments divorced from the context are seldom of any assistance.

The plaintiffs succeed in their contention that they have a right to exclude the defendant from the meetings of the council, and they are entitled to a declaration of that right and an injunction giving effect to it. The statement of claim refers also to committees of the council; but no question arose about them, and the order will be silent as regards that.

The defendant must pay the costs of the action.

R. M.

C. A.

The defendant appealed. The appeal was heard on January 21, 1908.

Hughes, K.C., *Jessel, K.C.*, and *Ellis J. Griffith*, for the appellant. The defendant claims the right to attend meetings of the council, as a member of the public and as a burgess. There is no express statutory provision on the point, but the council meetings are called by public notice posted on the town hall, indicating that the meetings of the council are of public interest, and meetings at which the public, and certainly the burgesses, have a right to be present. Except for particular and appropriate reasons, when it might be proper that the meeting should be held in private, it is essential that meetings of the council should be open to the public, and it is also essential that the proceedings should be fully reported. This question was discussed in *Purcell* v. *Sowler*. (1) [The Municipal Corporations Act, 1882, ss. 10, 22, 134, 232, and Sched. II., r. 5, were referred to.]

The Local Government Act, 1894, Sched. I., pt. 2, r. 13, provides that the meeting of the parish council shall be public.

[BUCKLEY L.J. A meeting of the London County Council appears not to be public in the sense in which a Court of justice is, which any member of the public may enter: *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*. (2)]

(1) 2 C. P. D. 215, 219. (2) [1892] 1 Q. B. 431.

The council have no right to exclude the defendant while admitting other members of the public; it is this capricious exercise of their power (if they have it) of which the defendant complains.

P. O. Lawrence, K.C., *Upjohn, K.C.*, and *A. A. Bethune*, for the respondents. The fact that there is no express provision in the Municipal Corporations Act, 1882, that the meetings of the council shall be public, and that there is express provision for meetings of district councils being public, shews that when the Legislature intended meetings of a body of this kind to be public it says so. Under s. 233 every burgess can get a copy of the minutes of any meeting, and is thus given an opportunity of finding out what has been done at the council meetings. Further, the council is elected by, and represents, the burgesses, and a burgess has no right to attend the meetings of his representatives, just as a shareholder has no right to attend the meetings of his directors. As to the claim to attend as reporter, the council have a right to revoke the invitation they previously gave him. Reporters generally are not excluded, nor is the defendant's paper.

Jessel, K.C., in reply.

COZENS-HARDY M.R. This is an appeal from what I believe was the last judgment of the late Kekewich J., which was written while he was away ill and delivered by Parker J. on his behalf. I desire to say that I agree with every word in that judgment, and I should be quite content to adopt it without adding any remarks of my own to-day, but, having regard to the importance of the question raised, it is better that I should state shortly why I have come to the same conclusion.

The only question for our decision is this: Whether the defendant's contention is well founded when he says that he has a right to be present at the meetings of the council other than the committee meetings; or, on the other hand, whether the council are right in attempting to give effect by this action to the resolution which they passed on March 11 that the town clerk be instructed to take the necessary proceedings to obtain an injunction against Mr. Mason to prevent him attending any future meetings of the council without the leave of the council.

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That is the issue, and it is a very short issue, between the parties.

What is this council? It is the governing body of a statutory corporation, a municipal corporation which derives its existence solely from statute. Is there any provision in the Municipal Corporations Act conferring a right upon any member of the public to attend? Admittedly there is no express provision. Can any such right be inferred from any of the language used in that section? I think plainly not. Can any right be inferred, not merely in favour of a member of the public, but one who is also a burgess? I think not. Sect. 233 of the Municipal Corporations Act, 1882, does confer certain rights upon the burgesses, rights which no doubt are very important in themselves, but which seem to me, as at present advised, to be the limits of the rights which are conferred upon the burgesses. Sect. 233 provides: "(1.) The minutes of proceedings of the council shall be open to the inspection of a burgess on payment of a fee of one shilling, and a burgess may make a copy thereof or take an extract therefrom. (2.) A burgess may make a copy of or take an extract from an order of the council for the payment of money. (3.) The treasurer's accounts shall be open to the inspection of the council, and a member of the council may make a copy thereof or take an extract therefrom. (4.) The abstract of the treasurer's accounts shall be open to the inspection of all the ratepayers of the borough, and copies thereof shall be delivered to a ratepayer on payment of a reasonable price for each copy." Then there is a provision about the freemen's roll, and so on, but not one word giving any right whatever, either to a burgess or any member of the public, to attend council meetings.

When we go to analogous legislation, we find an express provision in the Local Government Act, 1894, with reference to parish meetings and parish councils. By s. 1 of that Act provision is made that "there shall be a parish meeting for every rural parish and there shall be a parish council for every rural parish which has a population of 300 or upwards." When you have a parish meeting, it goes without saying that the parishioners have a right to attend that meeting; but when you

are dealing with a larger parish, and where in fact you are dealing with a population which cannot be supposed to have been able conveniently to attend a meeting, it was thought right to put the inhabitants of that larger parish in no worse position than the inhabitants of a smaller one, and by r. 13 of the second part of the First Schedule to that Act it is expressly provided that a parish council shall be open to the public unless the council shall otherwise direct. This same Act of Parliament constituted district councils, but there is no similar provision as to district councils. Taking the other Act of Parliament which created the county councils, it is conceded that there is no similar provision in that Act, but they are to be exactly on the footing of municipal corporations created by the Act of 1882 ; and we are now asked to imply in the case of all these bodies—for I do not think any distinction can fairly or properly be drawn between a municipal corporation, a county council, or a district council—that a public right to attend meetings is to be inferred in the case of all those bodies, when we find it expressly given in analogous legislation in the case of smaller communities, in which the same difficulty might not arise as would arise in the larger ones. I can see no ground whatever for implying or inferring, as against the council of a municipal corporation, a right which is not expressed anywhere, which has never, so far as I know, been claimed or asserted before, and which is not supported by a fragment of judicial authority.

For these reasons, which are really those which Kekewich J. relied upon, I am clearly of opinion that there is no such right as the defendant claimed, and that no member of the public, be he burgess or not, has a right to attend meetings of the council unless by the express or implied permission of the council itself.

In my opinion this appeal fails, and must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion, and for the same reasons.

BUCKLEY L.J. I will deal first with the alternative claim which the defendant makes in his defence, that the meetings of the council are public meetings, and that he is entitled to be present at them as a member of the public.

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In the case of proceedings before a Court of Justice or a tribunal which has similar attributes, whether it be a Court in the proper sense of the word, or a tribunal which in substance is a Court exercising judicial functions, it is, in this country, a first principle that the proceedings shall be public. Any member of the public has a right to come into a Court. But the Court has power to forbid him entrance; and may say, "Notwithstanding that you, as a member of the public, have that right, the Court has a higher right, the right to take away that which otherwise would be your right." This higher right is exercised by the Court in the interest of the public itself. The Court always sits to advance the public interest. The Court will, for instance, order the witnesses to go out of Court if justice requires that they shall not hear the evidence as it is given; or may order women and children out of Court if the facts in the case will be indecent. The Court in doing that is exercising a right on behalf of the public. There will be found in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (1) some observations as to what is a Court for the present purpose, and it will be found there that for instance a meeting of the London County Council for granting music and dancing licences is not for that purpose a Court.

It seems to me that this meeting of the council of the borough was not a public meeting such that any member of the public had a right to go in there. It was not a Court; it was not a public place; the meeting was not a public meeting. No person had, simply as a member of the public, the right to say, "Open that door: I will come in."

The next point is whether the defendant, as a burgess, a member of a limited class of the public, had a right to come in. There, it seems to me, I have to investigate the following as matter of principle. Where there is a governing body, a deliberative body, which is to control the interests and affairs of a large body of constituents, is there prima facie any right in a constituent to say, "I will be present at the deliberations of the deliberative body?" I think not. Whether it be the House of Commons deliberating upon the interests of all the subjects

(1) [1892] 1 Q. B. 431.

of the realm, or whether it be a board such as that of the London and North Western Railway Company, governing the interests of a large body of shareholders, or whether it be a meeting of the benchers of one of the Inns of Court to determine a question of the management of the property of the Inn, or the government of the members, and so forth, it seems to me that prima facie the constituent is not entitled to say, "I will be present at the deliberations of the governing body." It may be in the interest of the body governed that the deliberations shall not be held in public. The persons whose duty it is to determine questions of policy and questions of government ought to be placed in such a position that they can express their views freely, without the risk of their becoming communicated to the public, to the disadvantage perhaps of the body whose affairs they have to govern. Prima facie, the constituent has no right of access to the meetings of the deliberative body. Here the corporation with which we have to deal is, in a sense, a public body. It is the municipal corporation of this borough. It is a public body governing the affairs of those members of the public who are burgesses of the borough, but it is not public in the largest sense of the word. It is more analogous to the board of the London and North Western Railway Company, or the benchers of an Inn of Court governing domestic affairs. They are governing the affairs of the borough. It does not concern other persons who are not members of the borough. It seems to me that the burgess is not entitled to say, "I will come in and I will hear your deliberations."

But all this must be controlled no doubt by anything which is found in the statute which governs the corporation. If there is anything in the statute, that must prevail. The Master of the Rolls has dealt with the provisions of this statute and of the Local Government Act of 1894, to which reference may be made as to other like authorities. I fail to find in the Act which creates this corporation anything which says that a burgess is entitled to access to the meetings of the deliberative body. In s. 233 I do find that he is entitled to copies of the minutes of the proceedings of the council. He is entitled to know what they have done. But the Act contains no provision as to his being entitled to be present at the proceedings themselves.

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The only other point relied upon is that notice of the meetings is to be fixed upon the door of the town hall. I confess I am a little puzzled as to why that is, or why the concluding sentence of r. 5 in the schedule runs as it does: "Where the meeting is called by members of the council, the notice shall specify the business proposed to be transacted thereat." If the meeting is called by the mayor the public cannot see on the town hall what the business is to be, whereas if it is called by requisition they can. Why that is I am sure I do not know. There may be a reason for affixing this notice on the town hall, namely, that r. 7 provides that want of service of the summons on any member of the council shall not affect the validity of a meeting. There is nothing in the schedule sufficiently distinct to lead me to say that the object of putting up a notice on the door of the town hall was to inform the burgesses in the view that there was contemplated a right on their part to attend the meeting, when there is no other indication to be found in the Act of Parliament to that effect. I therefore do not think that as a burgess he has any right there.

His last claim was to go as a newspaper reporter. It is not necessary to say much about that. This council, from all that appears, have no intention of excluding the public from knowledge of what they are doing. There is no question of public policy. Newspaper reporters are admitted freely, but this particular gentleman, so far as I have been able to gather the facts, was not a sufficiently efficient shorthand writer to produce reports of their proceedings which they thought satisfactory, and they objected to his coming because the outcome of his work did not do them justice. I do not think anything in this Act shews that there is any right in this Court to interfere with the council in governing their proceedings in this respect, or that they are doing anything which is in any way improper.

I think the judgment pronounced by Kekewich J. is perfectly right, and this appeal should be dismissed.

Solicitors: *Smith, Rundell & Dods, for G. L. Stokes, Tenby; Norris, Allens & Chapman.*

W. C. D.

In re NORTON'S SETTLEMENT.
NORTON *v.* NORTON.

C. A.
1908
Jan. 20, 21, 22.

[1907 N. 1553.]

Practice—Staying Action—Abuse of Process of Court—Cause of Action arising out of Jurisdiction—Accessible Court where Cause of Action arose—Oppression—Injustice to Defendant.

An action was commenced in England, in which the plaintiff, a married woman, claimed an account under a settlement made in India on the occasion of her marriage in 1897, and she further alleged a wilful default by the defendants, one of whom, the plaintiff's husband, had been appointed a trustee of the settlement by a subsequent deed, the other two being the original trustees of the settlement. The defendants were all domiciled in England, but were ordinarily resident in India, the plaintiff's husband being a barrister practising in Calcutta, and the other defendants holding appointments in the Indian Civil Service. The property comprised in the settlement was in India. From 1902 down to the commencement of the action the plaintiff was living in France apart from her husband. She then came to England, where, as she alleged, she intended thenceforth to reside permanently. The husband and another of the defendants were served with the writ during their temporary presence in England. They applied to stay all proceedings in the action on the ground that it was an abuse of the process of the Court.

The Court was of opinion on the evidence that the plaintiff had in fact brought the action in England instead of in India, not for any bona fide purpose, but in order to obtain an undue advantage over the defendants, and that the continuance of the proceedings in England would necessarily be productive of injustice to the defendants: —

Held that, in these circumstances, the action ought to be stayed.

Eybert v. *Short*, [1907] 2 Ch. 205, approved.

Appeals from Swinfen Eady J.

The plaintiff Mrs. Marie Gerrard Bunbury Norton was the wife of the defendant Eardley John Norton, having been married to him in India in March, 1897. Both parties were British subjects and domiciled in England. Mr. Norton was a barrister, and had for many years before and up to 1906 lived and practised in Madras. In that year he went to Calcutta, where he was living and practising at the date of these proceedings.

On April 2, 1897, a deed of settlement was executed in Madras

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in pursuance of articles of agreement which had been previously entered into on March 2, 1897, in contemplation of the marriage of Mr. and Mrs. Norton, the parties to it being Mr. and Mrs. Norton and the defendants Norman Somerville Brodie and Edward Labouchere Thornton (both of whom were members of the Indian Civil Service) as trustees. By the settlement Mr. Norton assigned to the trustees seven equal eighth parts or shares, to which he was entitled in the residuary estate of his late father, expectant on the death of his mother (and which under a family arrangement had become vested in Mr. Norton), to hold the same upon trust that when and so soon as the same should fall into possession the trustees should stand possessed thereof in trust for Mrs. Norton absolutely.

Mr. Norton's mother died in December, 1902.

Mr. and Mrs. Norton lived together in India until September, 1902, when she left India, with his consent, and went to live in France, where she remained until the commencement of the present action.

In 1903 an indenture was sent by Mr. Norton to Mrs. Norton for execution by her, by which Mr. and Mrs. Norton, in pursuance of a power reserved in the settlement of April 2, 1897, appointed themselves trustees of the settlement in the place of the defendants Brodie and Thornton. Mrs. Norton executed the indenture on May 4, 1903, having first struck her name out of the clause appointing her one of the new trustees.

In 1906 questions arose between Mr. and Mrs. Norton with regard to the property the subject-matter of the settlement and other matters, and correspondence passed between her solicitors, both in Madras and in England, and Mr. Norton in India. In a letter to him, dated February 22, 1907, Mrs. Norton's solicitors in England wrote: "Mrs. Norton also declines to consent to any reduction in her agreed allowance of 1200*l.* per annum, and we beg you in your own interest not to think of making any such reduction as suggested. If you do, you will bring down upon yourself so many claims and of such a nature that they will be likely to crush you, but if you act fairly to your wife and continue to keep her full allowance punctually paid you may avoid such a disaster."

In the autumn of 1907 Mr. Norton came to England on a short visit, and about the same time Mrs. Norton left her house in France, and warehoused her furniture and came to England, but she and her husband did not meet.

On October 31, 1907, the writ in this action was issued, the sole defendant in the first instance being Mr. Norton. The claim was for an account of all moneys subject to the trusts of the settlement of April 2, 1897, received by the defendant or any other person or persons by his order or for his use, and whether as trustees of the settlement or otherwise. The address of the plaintiff as given on the writ was "care of Valpy, Peckham & Chaplin, of 19, Lincoln's Inn Fields." It did not appear clear from the affidavits whether the plaintiff was in fact in England at the time the writ was issued.

The writ was served on Mr. Norton on November 5 in England, and on November 9 he returned to India.

On November 22 the writ was amended by adding Brodie, one of the trustees of the settlement, as a defendant, and it was served on him on November 22, he being then temporarily in England on furlough.

On December 13 the writ was further amended by adding Thornton, the other trustee of the settlement, as a defendant.

Mr. Norton gave notice of motion that all proceedings in the action might be stayed, on the ground that the action was frivolous and vexatious and an abuse of the process of the Court.

Mrs. Norton applied for leave to serve the defendant Thornton out of the jurisdiction, namely, in India, where he was resident. This application was heard by Swinfen Eady J. at the same time as the motion to stay the proceedings.

The defendant Norton, in his affidavit in support of the motion, stated that the investments which represented the estate of his father were all situate in India, and that the settlement was executed for the sake of precaution only, as the property to which it referred had already as to part been expended on property the subject of voluntary settlements made by him on the plaintiff before their marriage, and partly in current expenditure for their joint benefit and with her knowledge and approval, and that all the evidence as to these transactions would be obtainable in India,

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and not in England; that the action was not bona fide, but had been instituted in England for the purpose of embarrassing him and for the purposes of annoyance; that he was the present trustee of the settlement, and as such was prepared to render all proper accounts of the trust property as from the date of his appointment, but that such account should in the circumstances not be taken in England; and that the plaintiff had refused to give him her address, and had refused to comply with his request made in October, 1907, that she should return with him to India.

The defendant Brodie filed an affidavit in which he stated that he was a member of the Indian Civil Service, and held the appointment of collector of Guntur, in the presidency of Madras; that he was only temporarily resident in England on leave of absence, having to return to India in March, 1908, and that it would be at least three years before he could get leave of absence to visit England again; that on the death of Mr. Norton's mother in December, 1902, he instructed his solicitors to take the necessary steps on behalf of himself and his co-trustee, the defendant Thornton, to carry out the trusts of the settlement, and that he was then informed that it was the intention of Mr. and Mrs. Norton to appoint themselves trustees of the settlement, and that the indenture of May 4, 1903, contained a release by Mr. and Mrs. Norton of the defendant Thornton and himself from all claims in respect of the settlement and an indemnity against all liability; that no property the subject of the settlement had ever been received by himself or the defendant Thornton; and that the defendant Thornton was district judge of Trichinopoly, where he now resided.

The plaintiff, in her affidavits, stated that she was advised that the indenture of May 4, 1903, was inoperative by reason of its not having been executed by Mr. Norton, and that the defendants Brodie and Thornton were still trustees of the settlement; that she was now permanently resident in England; that her husband's request to her to return to India was not genuine; that he had stopped her allowance, and that she was without means; and that it would be imposing a great hardship on her to compel her to go to India to prosecute an action in that country against her husband.

Swinfen Eady J. refused leave to serve the defendant Thornton out of the jurisdiction, on the ground that the claim was for an account only, and that it was admitted by counsel for the plaintiff that neither the defendant Thornton nor the defendant Brodie had ever received any property as trustees of the settlement. With regard to the defendant Norton's motion to stay, the learned judge held that the plaintiff clearly had a cause of action against her husband, and, although the action might perhaps be more conveniently tried in India, he felt unable to stay the action on the ground that it was frivolous or vexatious, and he accordingly dismissed the motion.

After the decision of Swinfen Eady J. the plaintiff amended the writ by giving as her address No. 21, Kingsworth Gardens, Folkestone, Kent, and by adding an allegation of wilful neglect or default in the receipt of the moneys subject to the settlement on the part of all three defendants.

The defendant Norton appealed from the refusal of Swinfen Eady J. to stay the proceedings.

The plaintiff appealed from the refusal to give leave to serve the defendant Thornton out of the jurisdiction.

Levett, K.C., and *Sheldon*, for the defendant Norton. This is really an Indian action, and should be tried in India. The settlement was executed in India, and will have to be construed according to Indian law; the property comprised in it is all in India; the three defendants and all the witnesses live in India, and the plaintiff would also be in India if she were living with her husband, as it is her duty to do. It will cause great and unnecessary expense to try the action in this country, and not only is it most inconvenient to the defendants to bring them over here, but most oppressive, for none of them can leave India without being seriously injured in their professions. The circumstances under which the action was started go to shew that the action has not been brought in England for any bona fide purpose, but in order to secure for the plaintiff an illegitimate advantage. The stay is not asked for on the ground that the action is frivolous or vexatious, as Swinfen Eady J. seems to have thought, but because it is oppressive to sue the husband here,

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and must produce injustice. The authorities shew that in the circumstances of this case the Court, in the exercise of its inherent jurisdiction, will stay the action on the ground that the proceedings are an abuse of the process of the Court: *Logan* v. *Bank of Scotland* (*No.* 2) (1); *Egbert* v. *Short* (2); *Thornton* v. *Thornton*. (3) There is another ground on which the action ought to be stayed. The writ was irregular in form when it was served on the defendant Norton, because the plaintiff's address was given as care of her solicitors, and no application to amend it in that respect was made until after the defendant Norton had returned to India.

W. M. Cann, for the defendant Brodie. It is not alleged that this defendant has ever received any of the trust property, and, though the writ has now been amended by alleging a wilful default, it is most oppressive that he should be sued in this country.

Micklem, *K.C.*, and *Crossfield*, for the plaintiff. Swinfen Eady J. may have been right in refusing leave to serve the defendant Thornton out of the jurisdiction, having regard to the fact that at the date of his decision the writ only claimed an account; but now that the writ has been amended it is right that leave should be given, and we apply accordingly.

[VAUGHAN WILLIAMS L.J. We must deal with the plaintiff's appeal as if the cause of action were the same now as it was when the case was before Swinfen Eady J.]

With regard to the defendant Norton's application to stay, the action is prima facie well founded, and cannot be said to be frivolous or vexatious; nor is it an abuse of the process of the Court. The deed of 1897, though executed in India, is really an English settlement, and all the parties to it are domiciled in England.

[FARWELL L.J. How is the question of domicil material? The contract was made in India, and the property and the witnesses are in India. The onus is on the plaintiff to rebut the presumption of an Indian forum.]

The plaintiff is permanently residing in England, and has a right to sue in England, and the two defendants were served

(1) [1906] 1 K. B. 141. (2) [1907] 2 Ch. 205.
(3) (1886) 11 P. D. 176.

in England. There is no instance in the books of an action being stayed when the parties are all domiciled in England and are either resident or have been served here. In the cases cited the circumstances were very different. In *Logan* v. *Bank of Scotland* (*No.* 2) (1) the plaintiff was a Scotsman, and the defendant bank had its head office and numerous branches in Scotland and only one branch in England. In *Egbert* v. *Short* (2) the plaintiff was the wife of an American domiciled in India. In *Thornton* v. *Thornton* (3) the Court refused to stay, although it was shewn that it was more inconvenient and more expensive to try the case in England than in India. It has not been established in the present case that the balance of convenience is in favour of a trial in India, or that it would be more expensive to try there, but to justify a stay it must be shewn that to continue the proceedings in England will produce manifest injustice. The evidence entirely fails to prove that that will be the case, and the suggestion that the plaintiff is not acting bona fide is without foundation. The plaintiff has sworn that she is without means, and it will be a great injustice to the plaintiff to compel her to go to India in order to prosecute her action.

Levett, K.C., in reply.

VAUGHAN WILLIAMS L.J. In this case there are two appeals from Swinfen Eady J. One of them is an appeal against the refusal of the learned judge to give leave to serve the defendant Thornton out of the jurisdiction. It has been admitted before us by counsel for the plaintiff that the learned judge's decision on this point was right, having regard to the facts then before him and to the way in which the action was then framed. Since his decision the indorsement on the writ has been amended by adding a claim in respect of an alleged wilful default, but we are of opinion that it would not be right in dealing with this appeal to take this subsequent amendment into consideration. The plaintiff's appeal must, therefore, be dismissed.

The other appeal is by the defendant Mr. Norton against the refusal of Swinfen Eady J. to stay all proceedings in the

(1) [1906] 1 K. B. 141. (2) [1907] 2 Ch. 205.
(3) 11 P. D. 176.

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action. In the circumstances of this case one would be desirous of staying the proceedings if there exist sufficient grounds for the exercise of the undoubted inherent jurisdiction of the Court. The Court has an inherent jurisdiction to stay proceedings on the ground that they are an abuse of the process of the Court, and the Court also has power, under Order xxv., r. 4, to stay proceedings on the ground that the case discloses no reasonable cause of action, or that it is frivolous or vexatious. It appears from the judgment of Cotton L.J. in *Thornton* v. *Thornton* (1) that the fact that an action has been commenced in England which might more conveniently and with less expense to the defendant be tried in India is not of itself a sufficient reason for staying the action. In *Thornton* v. *Thornton* (1) a husband, who was an officer in the Indian army stationed at Bombay, commenced divorce proceedings in India against his wife shortly after she had left India for England. The petition was served on the wife in England, and two days afterwards she commenced a suit in England for restitution of conjugal rights against her husband, who was then in England, but was starting for India in a few days. Some of the matters in issue in that case in the English suit would also have been in issue in the divorce proceedings in India, and it was admitted that it would be more convenient and less expensive to try the action in India before the case came on in England, but the Court nevertheless refused to stay the wife's suit in England until after the determination of the proceedings in the husband's suit in India. Cotton L.J. said (2): "I think that, notwithstanding the inconvenience and expense to which the husband must be put if both actions are allowed to go on, we ought not to prevent the wife from going into the question here, nor put her upon the terms of her action being stayed until the action in India is decided." It is to be observed that the question did not turn very much on the point that the same matters would have to be inquired into twice over, because if the husband's suit in India was successful, the wife's action would have necessarily come to an end; but notwithstanding that the Court refused to stay the proceedings in England. I only mention that case, which was relied on by counsel for the plaintiff,

(1) 11 P. D. 176. (2) 11 P. D. 180.

to shew that I have not overlooked it, for it is only remotely in point in the present case, but it does shew that in the circumstances of that case considerations of convenience and expense were not considered sufficient to justify a stay. It was suggested in argument that the same rule ought to be applied in the present case, and to the extent defined by Sir Gorell Barnes in *Logan* v. *Bank of Scotland* (*No.* 2). (1) I think it is a true proposition that the mere fact of increased expense of trial in England is not of itself a sufficient reason for granting a stay. I wish to say, further, that the undoubted inherent jurisdiction of the Court to stay proceedings on the ground that they are an abuse of the process of the Court should always be exercised with the greatest care and caution; and there is an additional reason in the present case for the exercise of caution, because in the opinion of Swinfen Eady J. the action ought not to be stayed. But the aspect of the case has been a good deal altered since it was before Swinfen Eady J. Not only has the writ been amended by putting forward a claim based on wilful default on the part of all three defendants, but further light has been thrown on the conduct of the plaintiff by certain matters which were not gone into in the Court below. As I have already pointed out, in order to justify a stay it is, as a rule, necessary that something more should exist than a mere balance of convenience in favour of proceedings in some other country. In my opinion it must be proved to the satisfaction of the Court that either the expense or the difficulties of trial in this country are so great that injustice will be done—in this sense, that it will be very difficult, or practically impossible, for the litigant who is applying for the stay to get justice in this country. Speaking generally, one may say that the litigant must shew that some injustice will be done to him. There is also another consideration to be borne in mind. If the Court, taking all the facts into consideration, comes to the conclusion that a plaintiff in commencing an action in this country has not done so on account of any legitimate advantage which a trial in this country will give him, but for purposes entirely foreign to that legitimate purpose, then, apart from any question as to expense

(1) [1906] 1 K. B. 141.

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or inconvenience, in my opinion not only has the Court jurisdiction, but it is its duty, to stay the proceedings.

I will now state as briefly as I can the facts which have caused me to come to the conclusion that the plaintiff has not brought this action in England for any legitimate advantage which she would thereby secure, but for reasons which are quite outside the scope of the advantages which she might legitimately hope to acquire by bringing her action here. I will first point out that considerable light is thrown on the successive steps which have been taken in this action by the letter of the plaintiff's solicitors of February 22, 1907. [The Lord Justice read the passages from the letter set out above.] That letter, to my mind, shews the spirit in which this litigation is being carried on. The defendant Mr. Norton is a barrister who has practised successfully for many years in Madras, and is now practising in Calcutta. On April 2, 1897, the settlement in respect of which this action is brought was executed in Madras, but for some time before that date the plaintiff had been in receipt of large sums from Mr. Norton, and she had also had control of their joint banking account. It cannot be doubted that, although the domicil of both Mr. and Mrs. Norton was English, it was contemplated that after their marriage they would continue to live in India; the settlement was executed in India, and it related to property which was entirely in India. In 1902, Mrs. Norton's health having become affected, she left India, her husband consenting, and went to live in France, where she was supplied with money by her husband for her maintenance. The trustees of the settlement of 1897 were two gentlemen, named Brodie and Thornton, both of whom were members of the Indian Civil Service. The subject-matter of the settlement was the estate of Mr. Norton's father, which had been left in trust for his widow for her life, and after the determination of her life estate it was to be divided among the children; but the shares of the children had under a family arrangement become vested in the defendant Mr. Norton, and it is obvious that, so long as Mr. Norton's mother was alive, there was no property which the trustees could deal with. She died in 1902, and it is common ground that the trustees have never received any of the

trust property, and it is said, and there is strong evidence to support it, that so much of the trust estate as has been spent was under the control of the plaintiff, and has passed through her hands. Still there was the settlement in existence, and I am not surprised that Mrs. Norton was advised that an account ought to be taken in order to ascertain what her position exactly was. Solicitors in Madras were instructed on her behalf, and considerable correspondence passed between them and Mr. Norton's solicitors in India on the subject; no writ was issued, but various points in the account were settled, but settled under a threat of litigation. Then in the autumn of 1907 Mr. Norton came to England on a short visit. When he started from India Mrs. Norton was still living in France in the house which she had taken there; but about this time she discharged her servants, warehoused her furniture, and came to England, and she is at the present time living in lodgings at Folkestone. Whether she had arrived in England at the date of her husband's arrival or at the date of the service of the writ upon him I do not know—the affidavits are not clear as to that; but it is somewhat significant that the plaintiff's address, as given on the writ, was care of her solicitors. Mrs. Norton has, however, sworn in her affidavit that she is now permanently resident in England. She appears, for no reason which has been given, to have become suddenly dissatisfied with what was being done by her solicitors in Madras, and she took advantage of the fact of her husband being temporarily in this country to serve him with the writ in this action. The defendant Brodie, who was in England on furlough, was also served. It is to be observed that as far as the trustees are concerned it would be more than an inconvenience—it would be a very serious thing indeed—if they were compelled to attend to these proceedings in England. Mr. Norton has sworn in his affidavit that to the best of his belief this action is not bona fide, but has been instituted in England for the purpose of embarrassing him and for the purposes of annoyance. [The Lord Justice read the passages from the defendant Norton's affidavit set out above.] I have come to the conclusion, not only that this is a case in which it is more natural and more convenient to try the question

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in dispute in India, because the settlement was made in India and refers entirely to property in India, but, further, that Mrs. Norton has brought the action in England, not for the purpose of any legitimate advantage which she might gain by so doing, but for the purpose of putting her husband in such a position that he would practically be compelled to settle the action on the terms of the solicitors' letter which I have already referred to.

I have gone into the matter at this length in order to make it quite clear that questions of expense or inconvenience are not sufficient to justify the Court in staying proceedings. It must be shewn, further, that the expense and inconvenience are of such a character that to allow the action to go on would result in real injustice to the other litigant. I have not thought it necessary to deal in detail with the question of the relative expense and convenience of proceedings in India and this country, because in my opinion there is in this case ample ground for holding that the English venue was not chosen for any legitimate reason, and that in the circumstances it is oppressive to bring this action in England. For these reasons I am of opinion that the action ought to be stayed.

FARWELL L.J. I am of the same opinion. The motion is to stay the action on the ground that it is frivolous and vexatious and an abuse of the process of the Court. The point as to the action being frivolous and vexatious has not been urged in this Court, but the application to stay is based on the ground that, on the assumption that there is a proper cause of action, the action is an abuse of the process of the Court. Now, abuse suggests to one's mind an element of wrong-doing in the party attempting so to abuse, and I think that in all the reported cases that element does appear. It is not necessary for us to determine whether the mere question of inconvenience would of itself be sufficient without that element, because in the present case we have the element of the abuse of the process of the Court by the plaintiff. The case most relied on by Mr. Micklem of *Thornton* v. *Thornton* (1) illustrates this point well. It was argued in that case that it was unreasonable and vexatious that there should be a

(1) 11 P. D. 176.

double litigation on the same matter, but the application to stay failed because there was not the same plaintiff in both actions; and the fact that A. had brought an action against B. in India was held not to be a good ground for preventing B. from bringing her own action against A. in England, B. not being the person who was guilty of the abuse of process by double litigation. But in that case Bowen L.J. at the end of his judgment says (1): "I do not say that we could not do so if we saw clearly that the ends of justice required it—if we saw clearly that it would be oppression or waste or vexation for her to proceed with her suit." Now, in the present case, the abuse consists of the mode in which, as appears from the letter read by my Lord, the plaintiff has attempted to obtain an advantage over her husband by putting him in the dilemma of either having to give up his practice in India for a considerable period, or of submitting to her demands and settling on the best terms that he can. First of all, to my mind it is obvious on reading this settlement that India was the proper forum in which the matter should be adjudicated upon. The spouses were married and were resident in India; the trustees were both of them civil servants resident in India, and the property was also in India; and if such breaches of trust as are alleged have been committed, those breaches of trust, as Swinfen Eady J. himself pointed out, were committed in India. The property was settled on the wife absolutely after the death of her husband's mother. I understood that there were no children of the present marriage, although there were children of the prior marriage. In the event that happened on the death of the mother, which occurred in 1902, the settlement would come to an end by the transfer of the whole of the trust funds to the wife. The locus solutionis contemplated was therefore in India, because the parties were at that time or thereabouts both resident in India, and it was obviously in the contemplation of the parties, when making a settlement of this nature in 1897, that the mother would die within a period during which the husband would still be carrying on his business as a barrister in India. Prima facie, therefore, India is the proper forum for determining these matters. The

(1) 11 P. D. 180

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wife thinks it more convenient for herself, and that she will gain more advantage, by choosing England. The husband is over here for three weeks on furlough, and she catches him while he is here and serves him with the writ. Now, speaking for myself, I am not at all satisfied with the mode in which the affidavits have been prepared on her behalf. There is a curious reticence with regard to the dates. I have the strongest doubt myself, having regard to the absence of those dates and to the extraordinary address on the writ, whether the plaintiff was in fact in England at all when the writ was issued: she still owns the house in France; she has warehoused her furniture; she does not say that she has gone into lodgings at Folkestone, but she simply swears she is now permanently resident in England. It appears to me she has treated herself as a resident in England for the mere purpose of bringing this action. The husband would be very much at a disadvantage, because the transactions took place in India and the property was out there. The documents are there; his evidence is absolutely essential; and he would have to come over here and bring all the papers with him if the case is to be tried here. In my opinion on all these grounds it is a case in which the wife is using the process of the Court for a sinister or bye purpose, to use a well-known phrase. In fact, I should put it in the way that Warrington J. put it in his judgment in a similar case in *Egbert* v. *Short* (1), where he says that, "On the whole the conclusion at which I have arrived is that this action is brought in the tribunal in which it has been brought not bona fide for the purpose of obtaining justice, but for the purpose of harassing and annoying the defendant, and of obtaining something to which the plaintiff may not in justice be entitled." I entirely agree. I think that Warrington J.'s conclusion of law as applied to the facts of that case was perfectly right, and I entirely agree with him. I think the same observation applies to this case, and the same conclusion should be come to.

KENNEDY L.J. I am of the same opinion. There is no doubt that the question in this case is of a peculiarly delicate character,

(1) [1907] 2 Ch. 214.

and where the facts are so much in conflict the Court, when the exercise of its special jurisdiction has been invoked, will be very cautious as to the inference to be drawn from the facts. The question arises between husband and wife, and I make no assumption whatever as to the merits of the unfortunate differences between the parties which have given rise to this litigation; but there are certain facts as to which there is no dispute. The husband's domicil is in England, but his ordinary place of residence has been for some time, and will in the natural course continue to be, in India. The wife's domicil is of course that of her husband, and the plaintiff is therefore not in any way, to borrow an expression that is used in one of the cases, exercising any claim to hospitality in the Courts of this country by commencing an action here. The question which we have to consider is whether this action ought to be stayed; it is not and cannot be alleged that the action is frivolous or vexatious, but the ground upon which the application is based is that it is a case in which the Court should, in its discretion, exercise its inherent power to prevent its procedure from being abused for the purpose of oppression and with the result of working injustice. Now on a question of discretion it is only with great reluctance that I should differ from the learned judge below, and more particularly in a case of this sort, where the discretion is only to be exercised in favour of the applicant with great caution. The degree of caution necessary has nowhere been better stated than by Warrington J. in *Egbert* v. *Short* (1), where he said: "The jurisdiction which I am asked to exercise is one which, as has been frequently said, is to be exercised by the Court with extreme caution; and, further, it is one which the Court ought not to exercise if by so doing an injustice will be caused to the plaintiff, and the real question which I have to decide is whether by preventing what, in my judgment, is a grievous injustice to the defendant, I shall at the same time be causing an injustice to the plaintiff. If I should be doing so, then I think it would be my duty to refuse this application." I think that the strength of the argument for the plaintiff lies in the contention that, however much it may be to the advantage

(1) [1907] 2 Ch. 212.

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of the defendant that the proceedings against him should take place in India, there is not any injustice in his being sued in England, whereas, it is said, the plaintiff must necessarily suffer injustice if she is not allowed to use the ordinary process of law in this country. That is the question which we have to decide. As to the jurisdiction of the Court there can be no question. It is not necessary to go through all the authorities; I merely refer to the passage from the judgment of Bowen L.J. in *Thornton* v. *Thornton* (1), which Farwell L.J. has read, and there is also the authority of the same learned judge in *McHenry* v. *Lewis* (2), and the authority of Sir Gorell Barnes in *Logan* v. *Bank of Scotland* (*No.* 2). (3)

I lay no stress on the technical informality in the writ when it was issued, because it seems to me that, when the jurisdiction of the Court is invoked on the ground that the proceedings are oppressive, one ought not to lay stress on technicalities of that kind. Nor do I feel that one has any right to weigh the convenience to the parties. I entirely assent to what my Lord has said, that where one has to deal with the exercise of discretion in a case of this sort, which affects important rights, the greater convenience to the defendant in being sued in India is by itself no sufficient reason for depriving the plaintiff of her right to sue in this country. The question of staying the action cannot in my opinion be decided on considerations, more or less speculative, as to the balance of convenience; but one must inquire whether or not injustice will result if the proceedings are not stayed, and whether or not there has been an oppressive use of the process of the Court which is sought to be put in force. I do not propose, after my Lord's judgment, to go in detail through all the facts and correspondence as to the relations of these parties. I will merely point out that the plaintiff's natural home, as she has not been separated from her husband, is with him in India; that he cannot leave India without giving up his means of livelihood, and that the evidence which will have to be given in the action is, except as to books or papers in the plaintiff's possession, also in India; and that the plaintiff herself has,

(1) 11 P. D. 180. (2) (1882) 22 Ch. D. 397.
(3) [1906] 1 K. B. 141.

through her solicitors, taken steps in India to bring about a settlement there of the questions in dispute.

In these circumstances I cannot help thinking that the plaintiff has taken advantage of the presence of her husband in England for a very short time in order to inflict what would be an injury upon him, if the proceedings were allowed to be continued in this country. On the other hand, if the action is stayed, there can be no real injustice done to the plaintiff, because, even if an action is brought in India and she is compelled to go there to support her case, her proper home is with her husband in India, and therefore the case is not one in which a person is compelled to go for the purpose of prosecuting his action, as an exile or as a temporary visitor at his own expense, to some place where he has no home and will be among strangers. The plaintiff in this case has a natural right to a home in the place in which this action ought to have been brought and in which the plaintiff was entitled to bring it. Therefore, not merely upon the grounds of convenience, and not without considering whether any possible injustice could be done to the plaintiff, but in order to protect the process of the Court, which in my opinion has been used in this case for purposes which were intended to cause annoyance to the defendant and which would work injustice to him, I think, with great deference to the learned judge below, that on the facts before us the application to stay the proceedings ought to be granted.

VAUGHAN WILLIAMS L.J. The action will be stayed as against all the defendants.

Solicitors: *Stibbard, Gibson & Co.; Graham Gordon; Valpy, Peckham & Chaplin.*

F. O. R.

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In re SIDNEY.
HINGESTON *v.* SIDNEY.

[1907 S. 2126.]

Charity—Gift—Charitable or Emigration Uses—Uncertainty.

A bequest in trust for "such charitable uses or for such emigration uses, or partly for such charitable uses and partly for such emigration uses" as the trustees should think fit, *held* void for uncertainty.

Decision of Swinfen Eady J., ante, p. 126, affirmed.

APPEAL from a decision of Swinfen Eady J. (1)

A testator, who died in August, 1906, leaving personal estate only, gave his residuary estate to trustees "upon trust to dispose of the same for such charitable uses or for such emigration uses, or partly for such charitable uses and partly for such emigration uses as they shall in their absolute and uncontrolled discretion think fit."

Swinfen Eady J. held that the gift was vague, indefinite and not charitable, and therefore failed.

The Attorney-General appealed.

Sir W. S. Robson, A.-G., and *George Lawrence*, for the appellant. It is admitted that the gift is bad if it is partly for charitable and partly for non-charitable purposes; it must be in its entirety a good gift to charity, or it must fail. Charitable purposes are discussed and defined by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2) as (inter alia)—(1.) trusts for the relief of poverty, or (4.) trusts for other purposes beneficial to the community not falling under any of the other three divisions.

The gift is good under the first definition as being for the benefit of "poor" emigrants. "Emigrants" in the common acceptation of the term refers to poor persons; that this is so

(1) Ante, p. 126. (2) [1891] A. C. 531, 583.

seems clear from provisions regulating their comfort in the Passengers Act, 1849 (12 & 13 Vict. c. 33); and see *Barclay* v. *Maskelyne*. (1) If the Court will infer that the gift is to "poor" emigrants, it is a good charitable gift. It is not necessary that the word "poor" should be actually used; it may be inferred that the gift is in relief of poverty, as was done in *Attorney-General* v. *Comber* (2), *Thompson* v. *Corby* (3), and *In re Dudgeon*. (4)

Secondly, emigration is certainly within the fourth definition as beneficial to the community at large, and is therefore a gift for public purposes and good, being within the fourth definition; just as a gift for the abolition of vivisection was held charitable in *In re Foveaux*. (5) The testator in this case obviously meant to benefit those who needed assistance, and, having this charitable intention and naming a public purpose, a thing for the public good, this is a good charitable gift.

Hon. E. C. Macnaghten, K.C., and *de Montmorency*, for the respondents, the next of kin. There is nothing to shew that the testator intended particularly to benefit "poor" emigrants, and there is no reason for inferring that this gift was in any way for the relief of poverty. There is nothing to shew that the community of this country were intended to be benefited; there is no mention of the country from, or the country to, which emigration is to be assisted. The words "benefit of the community" and "public purposes" are to be construed narrowly: *In re Macduff*. (6) It is not every object of public utility or of general utility that is a charity.

Rolt, for the executors.

Sir W. S. Robson, A.-G., in reply.

Cozens-Hardy M.R. This is an appeal from Swinfen Eady J., which raises a question as to the true meaning and effect of one short clause in the will of Mr. John Sidney. [Having stated it, his Lordship continued:—]

It has been contended on behalf of the Attorney-General that this is a good charitable gift within the meaning which the

(1) (1858) 4 Jur. (N.S.) 1294.
(2) (1824) 2 S. & S. 93.
(3) (1860) 27 Beav. 649.
(4) (1896) 74 L. T. 613.
(5) [1895] 2 Ch. 501.
(6) [1896] 2 Ch. 451, 462.

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Court has extended to the word. It has not been contended by him that if the gift is partly for charitable uses, and partly for non-charitable uses, it can be supported, or that there can be any apportionment between one purpose and the other. It must either stand as an entirely good gift to charities or it must entirely fail.

There is no difficulty about the first words, "such charitable uses"; but what is the meaning in this will of "for such emigration uses"? It has been argued by the Attorney-General that that phrase means a bequest for the benefit of the poor, and that we are to read it as though it were "for such charitable uses and for the benefit of such poor emigrants," or something of that kind—that we are to insert the word "poor" in some shape or form into that gift. I can see no justification for putting in that word. I cannot think that it would be any breach of trust on the part of the trustees, assuming this trust to be good and there to be no offence against the doctrine of perpetuities about it, for them to apply the money for purposes of emigration, which would not extend to the poor, but would extend to other classes of the community. Nor do I think that the Passengers Act, 1849, to which our attention has been called, really assists us, or furnishes any assistance in construing this will.

But then it is said, alternatively, if this is not to be treated as a charitable bequest for the relief of the poor, then it is a charitable gift which falls within what has been called the fourth definition as being for the advancement of objects of public utility.

Now these words, as has been pointed out by this Court I think more than once, but certainly very forcibly in the case of *In re Macduff* (1), must be construed narrowly, or, at all events, must not be construed with such breadth as we are invited by the Attorney-General to do. It is not every object of public utility or of general utility which is a charity. I do not know a stronger instance that can be given to illustrate my point than the case of *Kendall* v. *Grainger* (2), decided a very long time ago by Lord Langdale, and expressly approved by Lindley L.J. and Rigby L.J., in which the gift was "for

(1) [1896] 2 Ch. 451. (2) (1842) 5 Beav. 300.

encouraging undertakings of genera utility," and that was held not to be a charitable devise. I am quite unable to say that "emigration uses" are necessarily objects of general public utility within the meaning of what has been referred to in argument as the fourth definition. This gift does not say where the emigrant is to go from, or where he is to go to—whether to any part of the dominions of the King, or to foreign countries—or what class of emigrants the testator had in mind. There may well be some emigration uses which would not be within the meaning of "objects of general utility" as fairly construed. It seems to me, therefore, on this second ground, as on the first, the argument of the appellant cannot be sustained.

I think, therefore, for these reasons, which are substantially those given by Swinfen Eady J., the appeal fails and must be dismissed.

FLETCHER MOULTON L.J. With considerable regret I have come to the same conclusion.

I do not think the fact that the words "emigration uses" are put in contrast and antithesis to "charitable uses" at all decides the case. It is quite fair to hold that the word "charitable" in the earlier part of the sentence is used in the popular and more restricted sense and not in that which obtains in these Courts when we are deciding a question of this kind. The validity of the gift must stand or fall with the question, "Would it be a good charitable gift to give money for such emigration purposes as the trustees shall, in their absolute and uncontrolled discretion, think fit?" In my opinion it would not be a good charitable gift.

I have no doubt the testator intended the funds to be used in a charitable way, but he has not sufficiently defined the words "emigration uses" as to restrict the trustees from applying the funds in their hands in such a way as would not be charitable in a legal sense. There are very many emigration purposes which would not come under the definition of charitable purposes; it would not be a breach of trust for the trustees to use the money for any emigration uses that they thought were to the advantage of the community, and such a liberty is, I think, too wide to

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make this a good charitable gift. Therefore I am of opinion that the appeal must be dismissed.

BUCKLEY L.J. The decision of Swinfen Eady J. in my opinion was right.

The question is whether under this will the trustee is bound to apply these funds to charitable purposes. If consistently with the will he could apply any part of it to purposes which are not charitable in the sense in which the word is understood in this Court, the gift must fail as being too indefinite for the Court to execute. The testator uses the two expressions "charitable uses" and "emigration uses" in such a way as that I think in this will they are mutually exclusive. The phrase is, "for such charitable uses or for such emigration uses, or partly for such charitable uses and partly for such emigration uses, as they think fit." But I am not sure that the Attorney-General has not supplied an answer to that observation when he says that it may very well be, and I will assume it is the fact, that this testator in this will uses the word "charitable," not in the strict legal sense, but in the more popular sense. So that, as regards the antithetical use of the words, it does not follow that the emigration use might not be a charitable use. But, to test whether it is or not, I will suppose for the moment that the will had been simply "upon trust for such emigration uses as my trustees should think fit." Would that be a good charitable gift? To my mind it would not. Uses of emigration are not necessarily uses so beneficial to the community as a whole as to fall within the last of Lord Macnaghten's four definitions as properly understood, nor are they necessarily confined to persons who are destitute or from reasons of poverty deserve assistance. Emigration is a thing which the trustees might think should be advanced for other reasons, as, for instance, providing labour in some Colony where labour is wanted, or promoting the emigration of women from this country, which is overstocked with women, to countries where wives are much in request. Poverty is not necessarily the reason which leads people to emigrate. It may be they emigrate for totally different reasons. I am unable to find in this will either an indication of poverty or any such definition of

a public purpose for the benefit of the community at large, as would fall properly within the last of Lord Macnaghten's four definitions.

I think, therefore, that the appeal fails.

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Solicitors: *Treasury Solicitor; Beachcroft, Thompson & Co.; Saw & Sons.*

W. C. D.

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Costs—Lands Clauses Act—Sale of Copyholds—No Tenant on Court Rolls—"Outstanding Interest"—Fine on Heir's Admission—Steward's Fees—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 82, 83.

Trustees of a will agreed to sell a strip of the sub-soil under three copyhold houses to the London County Council, who by the contract were to pay "the vendors' costs of title and conveyance as allowed by the Lands Clauses Consolidation Act, 1845." On investigating the title it was discovered that there had been no surrender or admission since April, 1870; the vendors, at the request of the council, obtained the admission of the customary co-heirs of the last surviving tenant on the court rolls, a former trustee:—

Held, that the steward's fees and the costs of admittance of the co-heirs must be borne by the council under s. 82;

And *held*, also, by Cozens-Hardy M.R. and Fletcher Moulton L.J. (Buckley L.J. expressing no opinion on this point as the respondents had elected not to argue it), that the lord's fine on admission was not payable by the council.

In re London United Tramways Act, 1900, [1906] 1 Ch. 534, overruled on this point.

In re Bear Island Defence Works and Doyle, [1903] 1 I. R. 164, queried as to the "death duties" there allowed.

SUMMONS TO REVIEW TAXATION.

The question raised by this appeal was whether the steward's fees and other costs of procuring admittance to copyholds, and the lord's fine, were costs payable by a statutory purchaser under s. 82 of the Lands Clauses Consolidation Act, 1845.

In May, 1904, the London County Council, by virtue of the provisions of the Thames Tunnel (Rotherhithe and Ratcliff) Act, 1900, served notice on the trustees of the will of one

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William Gover to treat for the easement or right of making a tunnel under part of the trust estate. The price was subsequently agreed to by negotiation, and an agreement of sale and purchase was entered into between the trustees and the London County Council to the following effect.

By this agreement, of November 1, 1905, the estate and interest to be sold by the vendors was described as "Copyhold of inheritance of the manor of Stebunheath otherwise Stepney subject with other property to a quit rent of 1*s.* 6*d.* per annum and a fine certain of 1*l.* 10*s.* on death or alienation." The property to be sold was described as consisting of "the sub-soil or under-surface of the land forming part of the site of two houses each with yard and outbuildings situate Nos. 9 and 11 Broad Street and a house, shop yard and outbuildings situate No. 17 Broad Street which sub-soil or under-surface so far as it is hereby agreed to be sold" was delineated on a plan and section and thereon coloured red. The agreement provided: "The council are to pay . . . . the vendors' costs of title and conveyance as allowed by the Lands Clauses Consolidation Act 1845 under the provisions of which Act this agreement is entered into and is to be carried out."

On investigating the title of the vendors it was discovered that there had been no surrender or admission to this property since April, 1870, and in order to carry out the sale, and at the request of the council, the vendors obtained the admission of the customary co-heirs of the last surviving tenant on the court rolls, a former trustee. The extra costs thus occasioned were 15*l.* 0*s.* 10*d.* for the steward's fees and the legal costs of procuring the admittance, and 2*l.* 13*s.* 6*d.* for the fines payable to the lord of the manor of Stepney.

On completion of the purchase the vendors sent in their bill of costs to the council, which included the above-mentioned items of 15*l.* 0*s.* 10*d.* and 2*l.* 13*s.* 6*d.*, and, as the council refused to pay any costs connected with the admission of the co-heirs or the fines paid to the lord, the vendors obtained the usual order for taxation under s. 83 of the Lands Clauses Consolidation Act, 1845. The Master, after objections had been carried in on both sides, eventually allowed these two items of costs.

The council took out this summons to review.

Parker J., without expressing any opinion of his own, considered the case covered by *In re London United Tramways Act*, 1900 (1), and dismissed the summons.

The council appealed.

Jenkins, *K.C.*, and *Christopher James*, for the appellant. It is clear that the promoters would have had to pay any extra costs occasioned by obtaining the concurrence of these co-heirs when admitted, but the promoters are not bound to pay the extraordinary costs of getting these co-heirs on to the court rolls, which were occasioned by the exceptional state of this title. The costs now claimed are payments, not for the conveyance of the interest sold, but payments necessary to create in the vendors the right to convey that interest—payments that the promoters cannot be called upon to discharge; payments that are analogous to incumbrances, or arrears of rent or a fine on renewal of a lease. In the present case the fine and the fees would have become payable quite apart from this purchase, so that they ought not to be treated as costs of conveyance. The authorities are unsatisfactory.

In re South Wales Ry. Co. (2) is in favour of the promoters, but Lord Romilly afterwards changed his opinion in *In re Liverpool Improvement Act* (3); but if this case and *In re Nash's Estate* (4) and *In re Eastern Counties and Tilbury Junction Ry. Co.* (5) are examined, it appears that the extra costs allowed were due to requisitions by the purchaser of a purely conveyancing character.

In re Lloyd and North London Railway (City Branch) Act, 1861 (6)—where Stirling J. followed *Ex parte Kelly* (7) and *Ex parte Rorke* (8)—was decided on s. 80 of the Lands Clauses Consolidation Act, 1845, which relates to a wholly different matter.

In re London United Tramways Act, 1900 (1), is distinguishable, because the vendor, who was on the court rolls at the date of the contract, died before completion; and, further, Swinfen Eady J.

(1) [1906] 1 Ch. 534.
(2) (1851) 14 Beav. 418.
(3) (1868) L. R. 5 Eq. 282; 37 L. J. (Ch.) 376.
(4) (1855) 4 W. R. 111.
(5) (1856) 26 L. T. (O.S.) 176.
(6) [1896] 2 Ch. 397.
(7) (1893) 31 L. R. Ir. 137.
(8) [1894] 1 I. R. 146.

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felt himself bound by the Irish authorities, which are not binding on this Court. *In re Bear Island Defence Works and Doyle* (1) cannot certainly be supported on the question of the death duties.

What the promoters are to pay, under s. 82, is costs of conveyances and of "outstanding interests," but not the costs of some third person who is outside the contract, e.g., the lord of the manor. The mortgagee cases, therefore, and costs of vesting orders are distinguishable. The costs claimed are for "making" and "acquiring" title, words that are not in the section. The meaning of the words "deducing title" was considered in *Oakden* v. *Pike.* (2)

Even if s. 82 includes the costs of constituting a proper person to convey, it does not include the fine. It was not necessary to pay the fine before admittance of the co-heirs: the lord would have been bound to admit before payment, and the co-heirs could have conveyed to the council; and, besides this, the promoters are called upon now to pay the fine for the whole of the three houses, though they have only taken a small strip under one of them, and the fine is not apportionable.

Buckmaster, K.C., and *Gatey*, for the respondents, the vendors. Before coming into Court the vendors offered to forego the lord's fine, and now at the bar elect not to argue it and abandon the sum. The vendors are, on the authorities, clearly entitled to the costs of obtaining the admittance of the co-heirs, i.e., the steward's fees and other costs incidental to admittance. The description of the interest sold is sufficiently accurate: there is no distinction in principle between a vendor who is selling a "copyhold of inheritance" for whom an admittance has to be obtained and a vendor of a "freehold of inheritance" for whom an outstanding legal estate has to be got in; in each case the description of the property sold is quite accurate.

It is admitted that the costs of getting in an outstanding term or an outstanding interest are properly payable by promoters, and the present is nothing more than the costs of getting in an outstanding interest in a copyhold estate. *In re Nash's Estate* (3)

(1) [1903] 1 I. R. 164. (2) (1865) 34 L. J. (Ch.) 620.
(3) 4 W. R. 111.

and *In re Liverpool Improvement Act* (1) are illustrations of this, and are in favour of the respondents.

In re Lloyd and North London Railway (City Branch) Act, 1861 (2), was under s. 80, but Stirling J., adopting the language of an Irish decision, says (3), if the company, instead of paying the money into Court, had persevered in requisitions on the abstract, "the taking out of these administrations would have been necessary, and should have been paid for by the company." The costs of this admittance are properly payable by the promoters.

Jenkins, K.C., in reply. Apart from authority, these are not costs of getting in an outstanding interest within the wording of s. 82. "Copyhold of inheritance" can only be conveyed by taking the preliminary step of getting admittance. Here the vendors were not the heirs, who could have sold and conveyed, neither were they the persons through whom admittance could have been obtained.

Cur. adv. vult.

Feb. 14. COZENS-HARDY M.R. This appeal raises the question whether the costs payable by the London County Council, in respect of the taking of a portion of land under the surface for the purpose of a tunnel, include certain expenses incurred by reason of the land being copyhold. The contract provided that the vendors' costs of title and conveyance, as allowed by the Lands Clauses Consolidation Act, 1845, under the provisions of which Act the agreement was entered into and was to be carried out, should be paid by the council. The vendors were the trustees of the will of a Mr. Gover. It is not disputed that they had full power to sell the equitable customary fee, but it appears that since the death of the former trustees, who had been admitted to the copyholds, there had been no tenant on the roll. It became, therefore, necessary to admit the co-heirs of the last trustee in order that a proper assurance of the copyholds might be made in accordance with s. 95 of the Lands Clauses Act, 1845. Now, the contract must be read as if s. 82 of the Lands Clauses Act—which is the only relevant

(1) L. R. 5 Eq. 282; 37 L. J. (Ch.) 376. (2) [1896] 2 Ch. 397.
(3) [1896] 2 Ch. 402.

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section—was part of it. That section is as follows: "The costs of all such conveyances shall be borne by the promoters of the undertaking, and such costs shall include all charges and expenses incurred on the part as well of the seller as of the purchaser, of all conveyances and assurances of any such lands, and of any outstanding terms or interests therein, and of deducing, evidencing, and verifying the title to such lands, terms, or interests, and of making out and furnishing such abstracts and attested copies as the promoters of the undertaking may require, and all other reasonable expenses incident to the investigation, deduction, and verification of such title." The costs have been taxed under s. 83, but nothing can be allowed on the taxation unless it falls within the terms of s. 82 as properly construed. Now it is necessary to consider what was the position of the persons interested in the copyholds at the date of the contract. As I have already stated, the whole beneficial interest was in the persons claiming under William Gover's will. The vendors could have maintained an action for specific performance without joining any one as co-plaintiff. But the customary fee was in the heirs of the last surviving trustee. Though not admitted, they were, as against all persons except the lord, to be regarded as copyholders. They could surrender before admittance and bring ejectment. The important consideration is that they could be compelled to do what was necessary to enable the trustees of the will, or any person claiming as a purchaser from them, to be admitted on the court roll. In substance the interest of the co-heirs was an "outstanding interest" which the trustees had the right to get in in order to clothe themselves or a purchaser from them with the full legal customary fee. In these circumstances it seems to me that under the express language of s. 82 of the Lands Clauses Act, 1845, the costs of doing what was necessary to get in this outstanding interest must be borne by the London County Council. What, then, are the costs which ought to be included under this principle? I cannot see any ground for limiting it to the costs of the execution by the co-heirs of the deed of conveyance under s. 95. I think it must include costs which were necessary, not for the purpose of creating any new interest, but for the purpose of

enabling the co-heirs to pass that interest which they had. Although the co-heirs could surrender before admittance, they could not, I apprehend, execute a valid statutory assurance such as is required by s. 95 without being admitted. Now the steward's fees are payable on admittance, or rather I should say before admittance (see Stamp Act, 1891, s. 68), and I think they must be included. With respect to the lord's fine different considerations arise. The lord is bound to admit before payment of the fine, and indeed his right to sue for a fine only arises by reason of there having been admittance: see *Reg.* v. *Lord Wellesley*. (1) He has no charge upon the copyhold property for the fine, and no right to seize quousque so long as there is a tenant on the roll. Moreover, it would be wholly unreasonable to say that a company is bound to pay the lord's fine on admittance to what might be a large copyhold estate with a fine arbitrary which might greatly exceed the purchase-money for the land taken. And there is no provision for apportioning the fine.

The case is not unlike that of a married woman sole trustee of an outstanding legal estate. Apart from the Married Women's Property Act, 1907 (7 Edw. 7, c. 18), s. 1, she could not have conveyed without acknowledgment under ss. 79 and 80 of the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), and under certain conditions it would have been necessary to obtain an order of the Court under s. 91 dispensing with her husband's concurrence. I apprehend that the costs of and incident to the acknowledgment, and of and incident to the order under s. 91, would be included in the costs payable under s. 82 of the Lands Clauses Act, 1845. I have thus far dealt with the case apart from authority. In truth, there is very little authority upon s. 82. In *In re South Wales Ry. Co.* (2) Sir John Romilly held that the company were not liable under s. 82 to pay the costs of proceedings under the Trustee Act for the purpose of constituting a person to surrender the property in the place of an infant heir. But in the subsequent case of *In re Liverpool Improvement Act* (3) Lord Romilly expressed his conclusion that the former case was wrongly decided, and said: "I therefore

(1) (1853) 2 E. & B. 924.
(2) 14 Beav. 418.
(3) L. R. 5 Eq. 282.

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overrule that decision, which, I believe, stands alone." That was not a copyhold case, but the Liverpool Corporation were held bound to pay the costs of taking out administration de bonis non to a testator in whom a leasehold property was vested.

In 1902 the matter came before the Court of Appeal in Ireland in *In re Bear Island Defence Works and Doyle* (1), and it was held that the costs payable included, not only the costs of taking out administration to former occupiers, but also the death duties which were a charge upon the property. I have great difficulty in following the reasoning upon which the judgment proceeded, so far as the death duties are concerned. But so far as the costs of administration are concerned, the judgment follows the previous Irish decisions.

In 1906 a case identical in principle with the present case came before Swinfen Eady J.—*In re London United Tramways Act*, 1900 (2)—and he held that both the fees payable to the steward, and the fine payable to the lord, on the admittance of the vendor's heir, must be paid under s. 82. Parker J. properly held himself bound by this authority, and the present appeal is in substance, though not in form, an appeal from Swinfen Eady J.'s decision.

I do not think it necessary to consider the cases which have arisen under s. 80, the language of which is much wider than the language of s. 82. I refer to *Ex parte Keatley* (3), *Ex parte Rorke* (4), and *In re Lloyd and North London Railway (City Branch) Act*, 1861. (5) Nor do I think it necessary to consider whether the administration cases which have arisen under s. 82 were well decided. It is sufficient, in my opinion, to deal with the very peculiar state of circumstances existing in the present case. For the reasons I have indicated I think that the steward's fees on the admittance of the co-heirs, which was not for the creation of a new interest, but only for the evidencing and completing an existing outstanding interest, are payable under s. 82. I agree with Swinfen Eady J. on this point, but I differ from him as to the lord's fine.

(1) [1903] 1 I. R. 164.
(2) [1906] 1 Ch. 534.
(3) (1890) 25 L. R. Ir. 265.
(4) [1894] 1 I. R. 146.
(5) [1896] 2 Ch. 397.

The result is that the taxing Master's certificate should be reduced by 2*l.* 13*s.* 6*d.*, the amount of the lord's fine, but in other respects the certificate will stand.

FLETCHER MOULTON L.J. The present case relates to certain payments by way of costs and otherwise connected with the purchase of copyhold lands by the London County Council under compulsory powers granted to them for the construction of the Rotherhithe tunnel. Purchases by corporations under compulsory powers are regulated by the provisions of the Lands Clauses Consolidation Act, and the question now in issue turns upon the true interpretation of s. 82 of the Lands Clauses Consolidation Act, 1845. But to form a right conception of the scope and meaning of that section it is helpful to consider the whole process of purchase under that statute, and this will be best done by taking an ordinary case of compulsory purchase where, by reason of the absence of agreement between the parties, the complete machinery provided by the Act is put in force.

The transaction commences by the purchasing corporation serving a notice to treat under the provisions of s. 18 of the Act. Such a notice is served on every party interested in the lands to be taken. It must state the particulars of the land required to be taken, and demand from the party served with it the particulars of his estate and interest in such lands, and of the claims made by him in respect thereof. No statutory form of notice to treat is prescribed, but custom has led to the adoption of a form which is now well known, and fully complies with the requirements of the Act. The next step is that the party served sends in particulars of claim. They set out the interest which he claims to possess in the lands to be acquired, and usually set out also the amount which he demands for the purchase of that interest. If the parties do not agree on the sum to be paid for such interest, the assessment is made either by a jury or by arbitration. In such proceeding no question of title can be raised. The assessment is of the value of the interest which the party claims to possess, and of that only. The mere service of a notice to treat does not constitute a contract between the

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corporation and the party served. It is a step which cannot be retracted, but the completion must be enforced, if necessary, by mandamus, and not by action for specific performance. But as soon as the price has been fixed, whether by agreement or by statutory assessment, a contract is created, and can be enforced by specific performance. To fulfil his part of the contract the vendor (as in every other case of contract for the sale of lands) must shew a title to the interest he has claimed. It is the value of that interest that has been assessed, and it is that interest which he has contracted to sell, and therefore it is that interest to which he must shew title. I can find nothing in the provisions of the statute which shews any intention to put a vendor under the compulsory clauses of the Lands Clauses Consolidation Act in any other position in this respect (apart from the question of conveyancing expenses) than that of an ordinary vendor who has contracted to sell specific lands, or a specific interest therein; and I can see no reason or justification for attributing to the Legislature any such intention.

When the title has been proved there comes the question of conveyance. Here we are relegated to the group of clauses introduced by the words, "And with respect to the conveyance of lands be it enacted as follows," and comprising ss. 81 to 83 inclusive. The first of these sections provides short statutory forms of conveyance which it makes effectual to vest the interests purchased. Sect. 82 relates solely to the costs of the conveyances, and, as I shall have to explain more particularly its exact phraseology, I shall here content myself with saying that, broadly speaking, it puts all conveyancing costs upon the purchasing corporation; and s. 83 provides for the taxation of those costs. These sections are the only sections which give any special treatment to an ordinary vendor under a contract for the sale of land under compulsory powers when the price to be paid has been ascertained, and the only remaining question is the performance of the contract.

During the argument reference was made to s. 80, and deductions were drawn from a supposed analogy between the matters treated in ss. 80 and 82. Speaking for myself, I consider this to be unsound reasoning. Sect. 80 is part of the group of

clauses of which the heading is, "And with respect to the purchase-money or compensation coming to parties having limited interests, or prevented from treating, or not making title, be it enacted as follows." It therefore deals with a special class of cases in which the vendor is under disabilities, or is unable or unwilling to perform his contract. It provides for them by special machinery, and in a quite exceptional way; and s. 80 deals with the costs of the employment of that machinery. There is nothing of the kind in the present case. The only way in which the present case could be brought within the scope of these clauses would be by the vendors not making title. But it is common ground that they were in a position to make title, so that their not doing so would have been a case of "wilful neglect to make out a good title to the land required"—a case which is specially excepted in s. 80, and to which, therefore, the provisions of that section would not apply. It follows, therefore, that, even if the conduct of the vendors had been such as to entitle the corporation to pay the money into Court under s. 76, they could have done so without being liable to pay the costs specified in s. 80. But in the present case nothing of the kind was done or proposed to be done. The provisions of s. 80 are therefore irrelevant, and we have to consider solely the provisions of s. 82.

Before considering these provisions in detail it will be advisable to give shortly the facts of the present case. [Having stated the facts and the material portions of the agreement, his Lordship continued:—] Before us the respondents have abandoned their claim to be repaid the fine, but insist that they are entitled to the other items of the bill.

It remains to apply the provisions of s. 82 to these facts. That section reads as follows: [His Lordship read it, and continued:—] It will be seen that this provides for the payment of two classes of costs—first, conveyance and assurance; and, secondly, expenses of deducing, evidencing and verifying the title of the vendor. These words recall the language of the introduction or heading to this group of sections, and refer clearly to what are known as conveyancing costs, and not to sums which have to be paid to acquire rights. No one would dream of calling the

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payment of a fine for the renewal of a lease a cost of conveyance. Suppose that a man has an agreement for a lease giving him a right to have a lease granted or renewed in a certain form to him on payment of a sum of money. He might well contract to sell such lease to a corporation, and could perform his contract; but the payment of that sum of money which made him the sole possessor of the lease which he contracted to sell could not be called costs of conveyance. The test, in my opinion, is this: Is the vendor beneficially entitled to the interest which he purports to sell without deduction or incumbrance? If this is so, the statute considers the rest to be a matter of conveyance, and if the purchaser wishes the legal estate or any outstanding term or interest to be got in, he must pay the costs of doing so. But if there are incumbrances on the property, or if charges have to be paid before the vendor is in a position in which he can himself convey, or direct some one else to convey, this complete beneficial interest, it is the vendor who must get rid of those incumbrances and pay those charges. They are payments, not for the conveyance of the interest sold, but to create in him the right to convey or assure that interest.

We have now to consider the exact position of the lands so far as the vendor's title is concerned. At the date of the sale there was no tenant to the lands on the rolls of the manor, because the last tenant was dead, and the co-heirs of such last tenant had not been admitted. The lands, therefore, were liable to be proclaimed and seized by the lord for want of a tenant. To prevent this the vendors must procure the admission of a tenant; and, as they were beneficially entitled to the lands, they were in a position to do this by requiring those co-heirs to obtain admission. But they could only do so on terms of paying the expenses of such admission, which would include the steward's fee. They must also have provided the amount of the lord's fine; because, although the payment of that fine would not be a condition precedent to such admission, the vendors would none the less have been obliged to provide that fine before they could require those co-heirs to obtain admission, because at admission those co-heirs would become liable to be sued in assumpsit by the lord for the amount of the fine. In order, therefore, to perfect

their title, even as a holding title—that is to say, to secure the title of the land to themselves free from danger of seizure—they must have paid the steward's fee and the fine. These payments seem trivial in amount in the present case, but this is solely because the fine is certain and small. Had the lands been situate in a manor in which the fine was arbitrary, it might, and probably would, have amounted to two years' value of the whole of the land constituting the tenement and the buildings upon it; and this might have been far greater than the cost of the lands purchased, which must have represented in value a very small portion of the whole tenement. To which of the two categories, then, do the fine and expenses of admission in this case belong? With regard to the fine, I feel no doubt. The vendors could neither convey, nor direct any one else to convey, the estate that they had agreed to sell without deduction or incumbrance until they had paid the fine due on the transfer of the legal interest in the tenement from the last tenant to his co-heirs. Whether they desired to hold or to sell the property this liability to the fine constituted a true deduction from the value of this beneficial interest in the tenement, and, had the fine been a substantial one, would have been so regarded by any competent person in estimating the value of the rights the vendors possessed.

The expenses of admission stand in a somewhat different position. It would appear that an heir may surrender without previous admission, or, as the authorities put it, he is entitled to a dispensation in respect of the admission, but he must nevertheless pay the lord's fine. The vendors, therefore, could, on providing the amount of the fine, have directed the co-heirs to surrender to a purchaser without providing the amount of the expenses of admission, because they could claim that actual admission should be dispensed with. While, therefore, the vendors could not get a perfect holding title, good as against all the world, except by providing a tenant and procuring his admission, and therefore paying admission expenses as well as fine, they could convey the tenement to a purchaser by providing the fine alone, since the co-heirs could surrender to such purchaser. It is doubtful whether the co-heirs could have passed the property to the railway company in this way, because such conveyance

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has to be in accordance with the provisions of s. 95 of the Lands Clauses Act, 1845. But that is a difficulty arising directly from the fact that the purchase is under statutory powers, and the expenses arising in connection with it must clearly be paid by the council. Nor have I found any authority for supposing that a surrender of a portion of a copyhold tenement can be made by an heir before admission. These expenses, therefore, seem to me to be on the border line between expenses of conveyance and expenses of acquiring rights; and, although I feel great doubt on the point, I am not prepared to differ from my brethren, who consider that the steward's fee and expenses of admission are conveyancing expenses which must be borne by the council.

It now remains to examine the authorities. Let me first dispose of four cases which were cited to us or referred to in the course of the case, but which, in my opinion, have nothing to do with the question before us. They are—*In re Lloyd and North London Railway (City Branch) Act*, 1861 (1) (decided by Stirling J.), *Ex parte Lurgan Urban Council* (2), *Ex parte Kelly* (3), and *Ex parte Rorke*. (4) These cases are not under s. 82, but under s. 80, which relates to a wholly different matter. If the purchasing body is doubtful to whom the money representing the compensation should be paid, it has the right to pay it into Court and to leave the parties entitled to it to make good their claims before the Court. But if it avails itself of this procedure, it does so on the terms of bearing all the costs of the legal steps necessary to be taken by the claimants in order to get the money paid to them. These expenses are not conveyancing expenses at all, and have nothing to do with the provisions of s. 82. They are expenses of the distribution of the purchase-money, and not of the conveyance of the land. In all the four cases which I have named the items were of this kind, and were allowed expressly under the provisions of s. 80. It is true that in *In re Lloyd and North London Railway (City Branch) Act*, 1861 (1), there was also one item which was claimed under s. 82, but that was of a different character, and was disallowed by the judge.

(1) [1896] 2 Ch. 397.
(2) [1902] 1 I. R. 157.
(3) 31 L. R. Ir. 137.
(4) [1894] 1 I. R. 146.

The next group of cases consists of three English decisions and one Irish decision, which also, in my opinion, afford us no help in this case, because the costs allowed in those cases (though coming under s. 82) were rightly allowed under that section, whether we adopt the interpretation which is contended for by the respondents or that which is contended for by the appellants. These cases are—*In re Liverpool Improvement Act* (1), *In re Nash's Estate* (2), *In re Eastern Counties and Tilbury Junction Ry. Co.* (3), and *Ex parte Keatley.* (4) In all these cases the costs were due to requisitions of the purchasers of a purely conveyancing character. The titles were perfectly good holding titles, and the purchasers would have obtained from the transfer the full beneficial interest in the property as against all the world. They chose, however, to obtain complete formal conveyances of all outstanding interests, and consequently were held liable to pay the costs necessitated thereby. But they had the right as beneficial owners to require the concurrence of the owners of outstanding interests without payment. It was not a case, as here, of having to provide sums requisite to indemnify such persons from charges to which they rendered themselves liable by so doing.

It appears from the report of *In re Liverpool Improvement Act* (5) in the *Law Journal* that in the contract the vendor had not undertaken to make any other title than that by which he was then holding, which seems to have been a perfectly good holding title. The purchasers, however, required the formal concurrence of the personal representative of the testator, who had bequeathed the property (which was leasehold) to their vendor, and the costs were the necessary costs of obtaining such formal concurrence, and included the taking out of letters of administration for the purpose. It is expressly stated, however, that no probate duty was included. In *In re Nash's Estate* (2) the company had taken a conveyance of the property from the transferee of a mortgage under his power of sale. This was a perfectly good title, but the original mortgagee had died, and

(1) L. R. 5 Eq. 282.
(2) 4 W. R. 111.
(3) 26 L. T. (O.S.) 176.
(4) 25 L. R. Ir. 265.
(5) 37 L. J. (Ch.) 376.

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there was no one to convey the outstanding legal estate. Accordingly they petitioned to have some one appointed to convey it. The Vice-Chancellor said that the proceeding was tantamount to applying for a vesting order, and that the costs must be treated in the same way. *In re Eastern Counties and Tilbury Junction Ry. Co.* (1) was an exactly similar case. In *Ex parte Keatley* (2) the costs were due to a conveyancing requisition of the purchasing company, which the judge clearly thought unnecessary. He says: "Although the petitioner's title was quite good as a holding title, the execution of this deed was a formal link requisite for the completion of the title, according to the opinion of the counsel for the company. . . . . The case of *In re Liverpool Improvement Act* (3) appears to be in point, and shews that the costs of formally completing the title (which was in substance good before) should be borne by the company, who required that step to be taken." In all these cases the vendor was the beneficial owner of the complete and unincumbered estate which he purported to sell, and the costs incurred were due to the purchasers requiring a formal conveyance of the legal estate.

There remain three decisions which are relevant to the point in issue in the present case. The first in order of date is *In re South Wales Ry. Co.* (4) In that case Sir John Romilly decided a somewhat similar point to that which is in issue in the present case in favour of the contention of the appellants. But the authority of this case is weakened by the fact that in the subsequent case of *In re Liverpool Improvement Act* (3) the same judge expressed his opinion that his decision in the former case was incorrect.

The next in order of date is the decision of the Court of Appeal in Ireland in the case of *In re Bear Island Defence Works and Doyle.* (5) There is no doubt that the Court there took a view of the section directly contrary to the view which I have enunciated. But, although I must, with great respect, differ from the view taken by the Court of Appeal in Ireland in that case, the decision

(1) 26 L. T. (O.S.) 176.
(2) 25 L. R. Ir. 265, 268.
(3) L. R. 5 Eq. 282.
(4) 14 Beav. 418.
(5) [1903] 1 I. R. 164.

appears to me to be valuable as shewing the consequences to which the alternative interpretation put upon the section by the respondents must lead. In that case the contract was to sell the tenant right of certain land to which the vendor was entitled under the will of the previous holder, to which will no probate or administration had been taken. The Court held that the purchasers must not only pay the costs of probate or of administration, but must actually pay the death duties on the property, although these duties, unless paid, are a charge upon the land. It is thus a decision to the effect that the vendor of the lands was not bound to clear them of incumbrances, but was entitled to receive the full purchase-money and to leave his purchaser to pay off the incumbrances. I am entirely unable to follow the reasoning of this judgment. It appears to proceed on a local custom of the tenants in that part of the country not to pay death duties on their estates, of which custom the Court took judicial cognizance. I can see no substantial difference between such a custom and a custom not to pay mortgages. The learned Lord Justice who delivered the judgment of the Court also failed to perceive the difference between s. 80 and s. 82, and treats the decision of Stirling J. in *In re Lloyd and North London Railway (City Branch) Act*, 1861 (1), as being a decision under the latter section. But, be this as it may, I cannot think that the case was correctly decided, and, as it is not binding upon us, I am of opinion that it should not affect our judgment.

There remains only the case of *In re London United Tramways Act*, 1900 (2), which was decided in 1906 by Swinfen Eady J., and which is in substance the decision here appealed from. As I read his decision, he was of opinion that he was constrained to decide as he did by these Irish cases, and was not so much expressing his own opinion on the merits as his view that it was for a Court of Appeal to set the practice right if those cases were erroneously decided. As I have already said, I am of opinion that the case of *In re Bear Island Defence Works and Doyle* (3) was erroneously decided, but none of the other authorities, when

(1) [1896] 2 Ch. 397. (2) [1906] 1 Ch. 534.
(3) [1903] 1 I. R. 164.

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closely examined, support the contention of the respondents, so far at least as the fine is concerned.

On the whole, therefore, I am of opinion that the appellants were right in appealing from the judgment in the Court below so far as the fine is concerned, and I cannot find that the respondents abandoned that claim at any time previously to the hearing before us under circumstances which would entitle them to say that the appellants were wrong in prosecuting the appeal.

BUCKLEY L.J. In *In re Eastern Counties and Tilbury Junction Ry. Co.* (1) Wood V.-C., speaking with reference to the costs of appointing some one by vesting order or otherwise to make the requisite conveyance for a mortgagee who had died leaving no known heir-at-law, said, "the costs asked were of something (whether by a vesting order or otherwise) without which the land could not effectually be conveyed to the company"; and held that the costs were payable by the purchasing company. In *In re Bear Island Defence Works and Doyle* (2) Holmes L.J., in delivering the judgment of the Court of Appeal in Ireland, said with reference to the costs of taking out administration to former occupiers of the lands sold, "the principle is that the involuntary vendor was satisfied with his title; it was good enough for him, and administration would not have been obtained except to comply with the requirements of the purchaser exercising compulsory powers." In these passages is to be found that which I think is the true principle, namely, that under s. 82 of the Lands Clauses Act, 1845, the purchaser has to pay costs of proceedings with which the vendor, content with a holding title, might well have dispensed, but which are necessary to enable the vendor effectually to convey to the purchaser.

The vendor in the present case, before the hearing in the Court below, offered to give up his claim so far as regards the fine payable to the lord. He has taken the same attitude before us. Mr. Buckmaster, in rising to address the Court, said that he elected not to argue the question, lest if he should succeed upon it the council might take him to the House of Lords upon a question which might be of general interest to them, but had

(1) 26 L. T. (O.S.) 176. (2) [1903] 1 I. R. 167.

for him no interest beyond the 2*l.* 13*s.* 6*d.* in dispute. The question we have to decide, therefore, is confined to the steward's fees and the costs included in the bill (whose total is 15*l.* 0*s.* 10*d.*), and does not extend to the lord's fine of 2*l.* 13*s.* 6*d.* The question as to the lord's fine does not arise and has not been argued, and for that reason I abstain from expressing either agreement with, or dissent from, that which has been said by the other members of the Court on that point. I say, therefore, nothing as to whether the decision in Ireland in *In re Bear Island Defence Works and Doyle* (1) was right as regards the death duties as distinguished from the costs of administration. That question does not arise before us, seeing that the lord's fine is not claimed. The other items in the bill of costs are the steward's fees and the legal costs of procuring admittance. It is with those alone that we have to deal.

Where the legal estate is outstanding there are two cases—*In re Nash's Estate* (2) and *In re Eastern Counties and Tilbury Junction Ry. Co.* (3)—both decided by Page Wood V.-C., in which it was held that the costs of proceedings for the appointment of a person to convey in place of the heir-at-law of a deceased mortgagee are payable by the company. There are also two cases in which the costs of taking out administration so as effectually to pass leaseholds were held payable by the company—namely, *In re Liverpool Improvement Act* (4) and *In re Lloyd and North London Railway (City Branch) Act*, 1861. (5) The costs in the present case are, I think, indistinguishable in principle from the costs of taking administration. The customary heir of the copyholder is before admittance a complete tenant against all persons but the lord; he may enter and take the profits and maintain trespass and bring ejectment without having been admitted, and while the steward can under s. 68 of the Stamp Act, 1891 (which reproduces s. 34 of 48 Geo. 3, c. 149), before making admittance demand payment of his fees, the lord cannot, as a condition precedent, demand payment of the fine. It is not the fact that admittance operates in any sense to create the estate. The estate exists before admittance, but admittance is necessary to enable

(1) [1903] 1 I. R. 164.
(2) 4 W. R. 111.
(3) 26 L. T. (O.S.) 176.
(4) L. R. 5 Eq. 282; 37 L. J. (Ch.) 376.
(5) [1896] 2 Ch. 397.

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the tenant effectually to convey. There are two cases as regards copyholds; the first is Lord Romilly's decision in *In re South Wales Ry. Co.* (1), which he subsequently in *In re Liverpool Improvement Act* (2) himself overruled, stating that it was wrongly decided. From the last-mentioned case it is obvious that Lord Romilly thought no distinction could be drawn between such costs as those here in question and the costs of taking administration. The other case is *In re London United Tramways Act*, 1900. (3) I have here only to deal with that case so far as it was there held that the company must pay the fees. I say nothing about the fine. As regards the fees, that case, I think, was rightly decided.

In *In re Lloyd and North London Railway (City Branch) Act*, 1861 (4), Stirling J. cited from *Ex parte Kelly* (5) and *Ex parte Rorke* (6) passages, with which I concur, to the following effect. The former is that if the company, instead of paying into Court, had required a conveyance, the vendor would have recovered the costs of taking administration under s. 82, and that it would be strange if the company, by paying the money into Court, could escape such costs. The relevance of this is that Stirling J. approved a principle which treats costs under s. 80 and costs under s. 82 as governed by similar considerations. The substance of the latter lies in the following words: "It must be remembered that an owner of property may be quite content to remain with his title as it is, and may not care to make it better. But if his land is taken from him compulsorily he has to go further, and must shew at least something more than a holding title."

In my opinion these costs are within s. 82 of the Lands Clauses Act, 1845, and this appeal fails. The proper order, I think, will be that, the respondents not claiming payment of the lord's fine of 2*l.* 13*s.* 6*d.*, the appeal be dismissed.

Solicitors: *E. Tanner, Solicitor to the London County Council; Henry Gover & Son.*

(1) 14 Beav. 418.
(2) L. R. 5 Eq. 282; 37 L. J. (Ch.) 376.
(3) [1906] 1 Ch. 534.
(4) [1896] 2 Ch. 397, 402.
(5) 31 L. R. Ir. 137.
(6) [1894] 1 I. R. 146, 152.

W. C. D.

In re REGISTERED TRADE MARK NO. 37,760 OF DAVID GESTETNER.

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Nov. 27, 28.

Trade Mark—Registration—Invented Word—Fancy Word—Reference to Character and Quality of Goods—Descriptive Name—Patented Article—Patents, Designs and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 64—*Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 3, 9, 35, 36.

In 1881 G. obtained letters patent for a pen which he called the "Cyclostyle." From 1882 onwards the pen, with its accessories, paper, ink, &c., were sold under the name of "Cyclostyle." In 1884 the word "Cyclostyle" was registered under the Patents, Designs and Trade Marks Act, 1883, in respect of stationery and apparatus for producing facsimile copies of writings and designs, including the pen and its accessories. In 1895 the patent expired. By that time the word had become well known to the public as the name of the patented article and its accessories.

On an application under s. 35 of the Trade Marks Act, 1905, to expunge the word from the Register of Trade Marks:—

Held, that the word, being at the date of its registration the name of the pen, was not a fancy word not in common use within the meaning of s. 64, sub-s. 1 (*c*), of the Act of 1883.

Held, also, that it was not an invented word, nor a word having no direct reference to the character or quality of the goods within the meaning of s. 9 of the Act of 1905.

Where an article is made under a patent, the manufacturer cannot after the patent has expired claim a monopoly in the name by which the article has become exclusively known to the public.

In re Magnolia Metal Co.'s Trade Marks, [1897] 2 Ch. 371, followed.

Per Buckley L.J.: In construing s. 36 of the Trade Marks Act, 1905, the facts and the law at the date of the motion to expunge are to be considered. If on those facts and in that state of the law a trade mark, having been removed from the register, would be entitled to be replaced, the entry is not to be expunged on the ground that the mark was not registrable under the Acts in force at the date of its registration. That section does not mean that the Act of 1905 is to be applied to the facts at the date of the registration.

Decision of Neville J., [1907] 2 Ch. 478, affirmed.

APPEAL from the decision of Neville J. (1)

In June, 1881, one David Gestetner obtained letters patent for a pen for duplicating manuscripts. This pen was fitted at one end with a small toothed wheel. It was used for writing on waxed

(1) [1907] 2 Ch. 478.

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paper, in which, in process of being used, it made minute perforations. To take copies of this writing a sheet of paper was placed under the waxed paper, and an inked roller was then passed over the waxed paper, which, with its perforations, acted as a stencil, the ink passing through the perforations and thus marking on the paper under the waxed paper a copy of the writing.

By an agreement dated September 26, 1881, and made between David Gestetner of the one part and one Massey Mainwaring, trading as Fairholme & Co., of the other part, David Gestetner agreed, in consideration of certain payments and royalties, to assign to Fairholme & Co. his letters patent for the pen, which was to be named the "Cyclostyle." This agreement was subsequently carried into effect by a deed of assignment.

At first David Gestetner manufactured the pen for Fairholme & Co. Afterwards they made it for themselves. From 1881 onwards they sold the pen, with its accessories, paper, ink, and roller, under the name of "Cyclostyle," and that word became well known to the trade and to the public as descriptive of the patented article and its accessories.

On April 5, 1882, Fairholme & Co. registered under the Trade Marks Registration Act, 1875, a trade mark consisting of the device of a wheel with the word "Cyclostyle" underneath. This trade mark was not attacked.

On May 27, 1884, they registered the word "Cyclostyle" alone under the Patents, Designs and Trade Marks Act, 1883, in respect of certain goods in class 39 in the Third Schedule to the Trade Mark Rules, 1883 (1), namely, stationery and apparatus for producing facsimile copies of writings and designs.

By deed dated July 25, 1904, David Gestetner acquired from Fairholme & Co., who also traded as "The Cyclostyle Company," their business and the goodwill thereof, and the exclusive right to use the name "The Cyclostyle Company," and all trade marks used in connection with their said business, and particularly the word "Cyclostyle" and the registered trade marks of April 5, 1882, and May 27, 1884. The patent expired in 1895.

In or about the year 1899 the Neostyle Manufacturing Company, Limited, was incorporated for the purpose of manufacturing

(1) Reproduced as class 39 in Sched. III. to the Rules of 1890.

and selling stationery and apparatus for producing facsimile copies of writings and designs and other goods of a similar character and were carrying on business in such goods. This company applied under s. 35 of the Trade Marks Act, 1905 (1), to rectify

(1) Patents, Designs and Trade Marks Act, 1883, s. 64: "(1.) For the purposes of this Act, a trade mark must consist of or contain at least one of the following essential particulars: . . . ."

"(*c*) A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use."

Trade Marks Act, 1905, s. 3: "In and for the purposes of this Act (unless the context otherwise requires):—

"A 'mark' shall include a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof:

"A 'trade mark' shall mean a mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale:

"A 'registrable trade mark' shall mean a trade mark which is capable of registration under the provisions of this Act: . . . ."

Sect. 9: "A registrable trade mark must contain or consist of at least one of the following essential particulars:—

"(1.) The name of a company, individual, or firm represented in a special or particular manner;

"(2.) The signature of the applicant for registration or some predecessor in his business;

"(3.) An invented word or invented words;

"(4.) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or surname;

"(5.) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1.), (2.), (3.), and (4.), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark: . . . ."

"For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons. . . . ."

Sect. 35: "Subject to the provisions of this Act—

"(1.) The Court may, on the application in the prescribed manner of any person aggrieved by the non-insertion in or omission from the register of any entry, or by any entry made in the register without sufficient cause, or by any entry wrongly remaining on the register, or by any error or defect in any entry in the register, make such order for making, expunging, or varying such entry, as it may think fit: . . . ."

Sect. 36: "No trade mark which is upon the register at the commencement of this Act and which under this Act is a registrable trade mark shall be removed from the register

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the Register of Trade Marks by removing therefrom the word "Cyclostyle," on the ground that the word was descriptive of a patented apparatus and was not registrable under any of the Trade Marks Acts.

Neville J. ordered the word to be removed.

David Gestetner appealed.

T. Terrell, K.C., and *Walter, K.C.*, for the appellant. By s. 6 of the Trade Marks Act, 1905, the register of trade marks existing at the date of the commencement of the Act and all registers of trade marks kept under previous Acts are to be incorporated with and to form part of the register, and the validity of the original entry of any trade mark upon the registers so incorporated is to be determined in accordance with the statutes in force at the date of such entry. Therefore the entry of a trade mark while the Act of 1883 was in force, if valid under that Act, is entitled to remain on the register. By s. 36 of the Act of 1905 no trade mark which is upon the register at the commencement of the Act, and which under that Act is a registrable trade mark, is to be removed from the register on the ground that it was not registrable under the Acts in force at the date of its registration. It follows from these enactments that the word "Cyclostyle" is properly upon the register, if it is either (1.) a fancy word not in common use, within the meaning of s. 64, sub-s. 1 (*c*), of the Act of 1883; or (2.) an invented word; or (3.) a word having no direct reference to the character or quality of the goods within the meaning of s. 9, sub-ss. 3 and 4, of the Act of 1905.

First, "Cyclostyle" is a fancy word not in common use; but even if it were not, then, secondly, it is an invented word. When the section speaks of an invented word it means a word invented at the time of its dedication to the trade, not at the time of its registration, and still less at the time of the proceedings to

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on the ground that it was not registrable under the Acts in force at the date of its registration. But nothing in this section contained shall subject any person to any liability in respect of any act or thing done before the commencement of this Act to which he would not have been subject under the Acts then in force."

expunge. Neville J. has held that "Cyclostyle" is not now an invented word, because, assuming that it was invented at the date of the registration, it had ceased to be an invented word at the date of the present proceedings; and that, not being now an invented word, it is not an invented word within the meaning of s. 9 of the Act of 1905. That argument involves a misconstruction of s. 36. The effect of that section is to apply the provisions of the Act to the state of facts at the date of registration. At that date "Cyclostyle" was an invented word; an invented word is registrable under the Act of 1905, and therefore, by s. 36, it is not to be removed from the register on the ground that it was not registrable under the Act of 1883.

Thirdly, the word "Cyclostyle" has no direct reference to the character or quality of the pen, paper, ink roller, or other articles to which it is applied.

Jenkins, K.C., and *Sebastian*, for the respondents. The facts, which are not in dispute, shew that in 1884, when this word "Cyclostyle" by itself was registered as a trade mark, it had come to be the description, and the only description, of the Cyclostyle pen. It has been held that a patentee cannot extend his monopoly beyond the date of its expiration by registering as a trade mark the name by which alone the patented article is known to the public: *Linoleum Manufacturing Co.* v. *Nairn* (1); *In re Magnolia Metal Co.'s Trade Marks* (2); *In re Chesebrough's Trade Mark "Vaseline"* (3); *Cellular Clothing Co.* v. *Maxton & Murray.* (4) A word which has become the name by which alone an article is known cannot be a "fancy word not in common use" within the meaning of s. 64, sub-s. 1 (*c*), of the Act of 1883. Neither is it a "word having no direct reference to the character or quality of the goods" within the meaning of s. 9, sub-s. 4, of the Act of 1905. Nor yet is it an "invented word" within the meaning of s. 9, sub-s. 3, of that Act.

As to s. 36 of the Act of 1905, when it is sought under that section to retain as a registrable trade mark under that Act a mark which was not registrable under the earlier Acts, its claim to be registrable under the Act of 1905 must be considered in the

(1) (1878) 7 Ch. D. 834.
(2) [1897] 2 Ch. 371.
(3) [1902] 2 Ch. 1.
(4) [1899] A. C. 326, 344.

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light of circumstances at the time when the proceedings are taken to remove it. The test is, not whether if the Act of 1905 had been in force at the date of the registration the entry would have been valid, but whether the mark is, at the time when the proceedings are taken, a registrable trade mark under the Act of 1905. The question in this case, therefore, is this, Is "Cyclostyle" now an invented word? The answer is clearly in the negative; it has been a well-known word for many years.

T. Terrell, K.C., in reply. The objections of the respondents to this trade mark, assuming them to be well founded, can be met by amending the register under s. 35 of the Act of 1905 so as to exclude any reference of the word "Cyclostyle" to the pen itself.

LORD ALVERSTONE C.J. In my opinion the principle of *In re Magnolia Metal Co.'s Trade Marks* (1) clearly covers this case. An inventor cannot patent an article, give it its name, and then register the name as a trade mark and retain the benefit of that trade mark after the patent has expired. In this case Neville J. has held that the word "Cyclostyle" alone on the register in respect of stationery and apparatus for reproducing facsimile copies of writings and designs ought not to stand. It is not disputed that the word in that connection would include the Cyclostyle pen; and it would follow that a person who should now be minded to make a Cyclostyle pen could not call it by that name having regard to the trade mark, and would therefore be injured, hampered, and impeded by the presence of that mark upon the register. If this mark cannot be justified for the Cyclostyle pen, the entry on the register must be wrong.

In the year 1881 this pen, which was subsequently called the Cyclostyle pen, was patented by Mr. Gestetner. In or about the year 1882 it was suggested to him that it should be called the Cyclostyle. From thenceforth that name has appeared as the name of this pen in the specifications of other letters patent, and in books, such as dictionaries, accessible to all persons who might wish to know what the word "Cyclostyle" meant. Under these circumstances a person who makes this patented article

(1) [1897] 2 Ch. 371.

after the expiration of the patent is entitled to call it the Cyclostyle pen, and that is an objection to the registration of this word whichever be the correct view of the effect of s. 36 of the Act of 1905, whether in testing the validity of the entry on the register the Act of 1905 is to be taken as in force at the date of registration, or whether the question be, At the time when the validity is challenged, was the mark one which could be registered under the Act of 1905? Whichever be the true view of that section I think this appeal fails.

Under the Act of 1883, which was the Act in force at the date of the registration of this trade mark, the only words which could be relied upon as justifying the entry are those in s. 64, "a fancy word not in common use." It has been held in several cases that a word descriptive of the article itself was not "a fancy word not in common use." It follows that if the Act of 1883 was the only Act to be considered, the word could not have been validly registered under that Act. There is nothing in s. 64 of the Act of 1888 which would enable this word to be registered if it ought not to be registered under the Act of 1905.

I come, therefore, to consider whether this word could be registered under s. 9 of the Act of 1905. The first question is whether it is an "invented word" within the meaning of sub-s. 3 of that section. I think that it is not. It has been decided that words which have become part of the stock of human knowledge as describing a particular thing are not invented words within the meaning of that enactment. It may be that "Cyclostyle" was originally an invented word, notwithstanding that it was in a measure descriptive of the pen itself. It was decided in *Eastman Photographic Materials Co.* v. *Comptroller-General* (1) that an invented word did not cease to be an invented word for the purpose of registration because it was also descriptive or partially descriptive. But that case did not decide that, because a word was originally invented, therefore it was always to be treated as an invented word. It did not touch the question which arises to-day, namely, whether, when a word originally invented has in process of time become descriptive of a particular article, it can afterwards be registered

(1) [1898] A. C. 571.

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as an invented word. In the present case for a number of years, ever since 1884, "Cyclostyle" has been the name by which this pen has been described and known, and, in my opinion, though it was invented for the purpose of describing that article, the word is not an invented word for the purpose of being registered as a trade mark.

Then can it be said to be a "word having no direct reference to the character of the goods" within the meaning of sub-s. 4 of s. 9 of the Act of 1905? In my opinion it cannot. When an article has been made under a patent and has been described by the patentee and by persons who are seeking to improve it and has become known to the public by a particular name, that name cannot be other than a word having direct reference to the character of the goods. I think, therefore, that Neville J. was right when he held, following the decision of Rigby L.J. in *In re Magnolia Metal Co.'s Trade Marks* (1), that this mark, being in fact the name of a patented article, cannot stand upon the register as a trade mark. I will not read again, but I would refer to, the judgment of Rigby L.J., who said that that fact alone was sufficient to decide that the Magnolia Company were not entitled to retain their trade mark "Magnolia" on the register.

Being pressed with this difficulty, Mr. Terrell asked that the register should now be amended so as to give both parties what they are entitled to. No doubt we have full power under s. 35 to do this and to direct any necessary steps to be taken to bring the proper materials before us, adjourning the case if necessary for that purpose. But in my opinion we ought not to deal with the case in that way on appeal from the learned judge. No application was made to Neville J. to give further evidence which would enable him to rectify the register as suggested, and on the evidence adduced in this case I am not satisfied that the respondents to this appeal would be entitled to claim as a trade mark for paper, ink rollers, and other accessories of the pen the word "Cyclostyle." Their title to do so would depend upon the evidence as to actual user; the mere fact that they have connected the name with other accessories might not be

(1) [1897] 2 Ch. 371.

sufficient. For these reasons I think that the order of Neville J. was right, and that this appeal must be dismissed.

BUCKLEY L.J. I agree. The order of Neville J. was, in my opinion, right.

I should like to say a word or two upon two points. First, as to the construction of s. 36 of the Act of 1905. It is a saving clause. I think it may be read thus, Take the facts of to-day and the law of to-day and inquire whether, if the mark in question were taken off the register, it would on the facts of to-day and the law of to-day be entitled to be entered again upon the register. If so, it must remain upon the register.

Now I will state what s. 36 does not mean. I take the date 1884, which is the relevant date in this case. Sect. 36 does not mean, Take the facts of 1884; assume the Act of 1905 to have been the law in 1884, and see whether upon that assumption the entry on the register could validly have been made in 1884.

The other matter on which I desire to say a word is Mr. Terrell's application under s. 35 of the Act of 1905 to vary the entry. Practically the Neostyle Company say that they have got and want to sell an article which is known as the Cyclostyle pen. That is the word which describes the article. They say that they have a number of those articles and want to sell them by the name which describes them, just as in *Linoleum Manufacturing Co.* v. *Nairn* (1) the defendants wanted to sell linoleum, a thing which had become known by that name. The Neostyle Company say they are entitled to sell these pens as Cyclostyle pens, and that they are prevented from doing so by the existence of this mark upon the register. And that is so. The mark is therefore too large in any case. Whether it could be defended if its application were more limited is another matter. We are not deciding now that it could not, and we are not affirming that it could. On the present materials it does not seem that it would be right to vary an entry by determining on these materials how it should be limited. No evidence relevant to that matter was before the learned judge, and not until judgment had been given was any application made for that purpose.

(1) 7 Ch. D. 834.

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I think we should be doing an injustice by allowing such an application to be maintained now. The entry as it stands is wrong, and must be expunged. It does not follow that some other entry would not be right.

KENNEDY L.J. I concur, and have nothing to add.

Solicitors for appellant: *Pritchard, Englefield & Co.*
Solicitor for respondents: *C. Urquhart Fisher.*

W. H. G.

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SLADE *v.* CHAINE.

[1902 S. 3377.]

Trustee—Liability—Settled Fund—Misappropriation—Unauthorized Investment—Restoration of Capital with Interest at 5 per Cent.—Capital and Income—Claim of Capital to excess of Interest beyond Amount obtainable from authorized Investments.

The sole trustee of a marriage settlement realized a sum of Consols which had fallen into possession and formed part of the settled funds, and in breach of trust applied the proceeds in paying off a private debt which bore interest at 5 per cent. Subsequently he restored the capital in full to the trust estate, and it was assumed that he had paid interest thereon at the rate of 5 per cent. to the tenant for life under the settlement, who made no claim against him:—

Held, that the persons entitled under the settlement to the fund in remainder were not entitled, as against the tenant for life, to attribute to capital the excess of interest over the amount which would have been produced if the fund had been invested in authorized securities, and that the trustee had completely discharged himself.

Stroud v. *Gwyer*, (1860) 28 Beav. 130, followed and approved.

By a settlement dated January 28, 1856, and made in contemplation of the marriage of Frederic Sayer with Miss H. M. S. Phipps, which marriage was shortly afterwards solemnized, a sum of 10,000*l.* 3 per cent. Consols, to which the husband was entitled in reversion on the death of the survivor of his father and mother, was assigned to trustees upon trust as soon as might be after the decease of the said survivor to require payment of the fund to them, and upon further trust either to permit the same to remain

on the existing securities or otherwise, with the consent of the husband and wife or the survivor of them, and after the decease of the survivor in the discretion of the trustees, to call in and convert the same into money and invest the proceeds as therein mentioned, and upon further trust "to pay the dividends interest and annual income of the said trust funds" to the husband for life, and after his decease to the wife for life, and after the decease of the survivor to hold as well the capital or principal of the said trust funds as the dividends, interest and annual income thereof upon the usual trusts for the children of the marriage.

On February 28, 1868, Frederic Sayer died. There were nine children of the marriage, of whom the plaintiff Mrs. Slade was one.

On December 4, 1872, Mrs. Sayer married Colonel Chaine.

On April 14, 1874, Mrs. Chaine, under the power in that behalf contained in her marriage settlement, appointed her husband, Colonel Chaine, a trustee thereof, and in September, 1881, he became the sole trustee.

On May 18, 1882, the 10,000*l.* 3 per cent. Consols fell into possession, and after payment of duties this sum was reduced to 9878*l.* 3 per cent. Consols, which was paid to Colonel Chaine as such sole trustee.

On June 21, 1882, Colonel Chaine sold these Consols at par, and on June 30, in breach of trust, he paid 8000*l.*, part of the trust funds, to Messrs. Coutts' bank in discharge of two loans of 5000*l.* and 3000*l.* made by the bank to him, and both bearing interest at 5 per cent.

On July 21, 1902, Colonel Chaine replaced the 8000*l.*, and he expended 9878*l.* in the purchase of authorized trust securities. He then retired from the trust and new trustees were appointed in his place, and in August, 1902, he transferred these securities to the new trustees.

In October, 1902, an action was commenced by Mrs. Slade, who was entitled in remainder under the marriage settlement of January 28, 1856, and her husband against Colonel and Mrs. Chaine and others for (inter alia) a declaration that Colonel Chaine ought to account for all moneys received by him as trustee of the settlement, and that he was answerable for all

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losses occasioned by any breaches of trust on his part in dealing with the trust funds; and by the judgment in that action an inquiry was directed whether Colonel Chaine had made any and, if any, what profit by reason of his dealing with any and which of the trust funds comprised in the settlement.

Great difficulty was experienced in prosecuting this inquiry owing to the illness of Colonel Chaine, and it was not proved that he had made any profit out of the trust funds otherwise than by relieving himself of the liability to pay the 5 per cent. interest due on the loans of 5000*l.* and 3000*l.* by discharging those loans out of the trust funds.

Eventually the plaintiffs took out this summons to have it determined whether Colonel Chaine was chargeable with interest in respect of the 8000*l.* so misapplied as aforesaid, and what, if any, part of the said 5 per cent. interest was attributable to or formed part of the capital trust funds.

Mrs. Chaine, as tenant for life under the settlement, made no claim for interest against her husband, and for the purposes of the summons it was assumed that Colonel Chaine had replaced the 8000*l.* with interest at 5 per cent., and that this interest had been received by Mrs. Chaine.

The summons was heard before Kekewich J. on May 15, 1907.

Stewart-Smith, K.C., and *Ribton*, for the plaintiffs.

P. O. Lawrence, K.C., and *Vaughan Hawkins*, for the defendant Colonel Chaine.

KEKEWICH J. It is common ground that the defendant William Chaine, being sole trustee of the settlement of January 28, 1856, has misappropriated some of the funds belonging to that settlement. To the extent of 8000*l.* he realized the trust funds, and used them for his own purposes. It is further common ground that he afterwards restored the trust funds, so that in that sense the capital of the trust is intact. Those who are entitled in remainder to the corpus of the trust fund have, and will have, the whole of their trust property divisible among themselves just as securely, and to the same amount, as if no breach of trust had ever been committed. But it was suggested that the defendant

William Chaine, in the interval when the trust funds were in his hands, had made a profit on them, and at the trial an inquiry was directed whether the defendant William Chaine had at the date of the writ in this action made any and, if any, what profit by reason of his dealing with any and what portion of the trust funds comprised in the settlement. That concedes, of course—I am bound as much as any others by that inquiry—that, if William Chaine made a profit, that profit must belong to the trust estate, and it is not denied on his behalf that he would be accountable for the profit to the trust estate. It would be too late to say now, if it could be said with the slightest advantage at any time, that the profit had been handed over to his wife, who is the tenant for life under the settlement. The inquiry, I say, imputes the responsibility of William Chaine to the corpus of the trust estate of any profit made by him by means of the breach of trust. But it has been found impossible, under the unfortunate circumstances, to pursue that inquiry, and those representing the corpus of the trust fund are driven back to make the best that they can of such facts as are available, and they are able to say in such manner that it cannot be contradicted that William Chaine received 5 per cent. on this 8000*l.* As a matter of fact he did not invest this 8000*l.*, but he used it to pay off a debt to his bankers on which he had been charged interest at 5 per cent. The question arises, To whom does that 5 per cent. belong? Those representing the corpus of the trust estate say, "It is money which you hold as trustee." That is not denied. The next step is, "You must pay it to us or the present trustees of the settlement to be added to the corpus of the trust estate, or at any rate you must pay the difference between that and what the tenant for life would have received if the money had been invested in trust securities and realized, say, 3 per cent." The answer which the defendant William Chaine makes is, "It was interest received on the money in my hands invested by me I have paid it over to the tenant for life, and that is a complete discharge." The question is whether it is a complete discharge.

It is singular that there is no more authority directly on this point than there is, but there is some. Many cases have been cited, but I shall content myself with referring to only three. The first

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is *Stroud* v. *Gwyer* (1), before Romilly M.R. He decided, so far as I can understand the case, the precise point perfectly clearly. It was a case that covered many questions, and the questions are perhaps not easy to be dissected in the judgment, but I think that they can be sufficiently for my present purpose. The case arose under a trust in a will, and that must not be forgotten in adverting to the learned judge's remarks. There the testator had given authority to his executors to enter into a partnership, and many questions arose about that. But the partnership which had been authorized came to an end, and another partnership arose, called in the report the second partnership, to which the authority given to the executors had no application whatever. The executors advanced money to that partnership, or, speaking more strictly, permitted some of the capital of the testator to remain in that partnership, which was a breach of trust. The learned judge dealt with the question of the executors' liability and with the claim of the cestuis que trust to convert into capital part of the income received from the trust funds, and, referring to the authorities cited in support of that claim, he says (2): "All those cases, of which *Dimes* v. *Scott* (3) is one, relate to instances where the property was found in a particular state of investment at the testator's death. But when trustees or executors commit a breach of trust by lending it on some unauthorized security, then I am of opinion they have discharged their liability in favour of the cestuis que trust who are entitled to the capital in remainder, when they have made good the capital and any increase which that capital has received." That seems to me to be a clear expression of opinion on the point which I have to decide. By "increase which that capital has received" he does not mean increase by way of interest, but increase by way of profit—some accumulations, something by way of accretion to the capital. *Stroud* v. *Gwyer* (1) was much discussed before Hall V.-C. in *In re Hill* (4), and my attention has been pointedly called to the passages in which he reflects on Lord Romilly's decision. In the first place, he does not differ from *Stroud* v. *Gwyer* (1)—that is to say, he does not consider

(1) 28 Beav. 130.
(2) Ibid. 141.
(3) (1827) 4 Russ. 195.
(4) (1881) 50 L. J. (Ch.) 551, 553.

it conclusive of the question before him—but he evidently does not think it a case which he would desire to follow, though I am not by any means sure that his remarks are directed to more than a part of the case. He is speaking in the beginning of his judgment of the interest which he proposes to allow to the tenant for life, and in connection with that he says, referring to the case of *Davies* v. *Hodgson* (1): "That is another authority against the general observations of the Master of the Rolls in the case of *Stroud* v. *Gwyer*." (2) I have been unable to satisfy myself what the general observations of the Master of the Rolls in *Stroud* v. *Gwyer* (2) are. The passage I have read scarcely can be called general observations; it is a distinct judicial expression of opinion on one particular point. Then he goes on to say: "I confess that as regards *Stroud* v. *Gwyer* (2) I cannot understand the principle of that decision." Again, as I mentioned, it fell to the Master of the Rolls in *Stroud* v. *Gwyer* (2) to decide many points, and the one point we are concerned with was only one out of several, and the passage in which he decided it is only a short passage out of a somewhat long judgment. Still, the Vice-Chancellor might have been referring to that. Then, having said that it was not necessary to question that decision in the particular facts and circumstances of the case before him, he says: "There are observations of the Master of the Rolls in that case drawing a distinction between the non-conversion of existing investments and the putting into an unauthorized investment a fund not already invested, the reasoning of which I really cannot follow."

It seems almost impertinent on my part to say that I can follow reasoning which so shrewd a master of equity as Hall V.-C. could not follow. But it nevertheless seems to me that the distinction is drawn pretty clearly. When you are concerned with the non-conversion of existing investments, and are applying what is called the rule in *Howe* v. *Earl of Dartmouth* (3), you are proceeding on the presumed intention of the testator that his settled property is to be enjoyed by all the beneficiaries in succession, and that therefore he cannot have intended that a

(1) (1858) 25 Beav. 177. (2) 28 Beav. 130.
(3) (1802) 7 Ves. 137a.

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property like long annuities, for example, was to be exhausted by the first tenant for life, and consequently there must be a conversion, either actual or notional, and the tenant for life must only have fair interest on the sum which would have been realized upon conversion at the present time. That is an invention of the Court in order to give effect to what is presumed to be the intention of the testator. When you are dealing, on the other hand, with putting into an unauthorized investment a fund which is not already invested, such as a sum of cash in the hands of the trustee, or the proceeds of sale of property which has been properly realized, you are dealing with an entirely different set of circumstances. Therefore, where there is no presumption in the case, you turn to your investment clause and find out what the trustee's duty is, and visit him with the consequences of the breach of trust according to the rules of the Court, if he has not followed them. I will not pursue the subject further, but as the Vice-Chancellor made those observations on *Stroud* v. *Gwyer* (1) I have thought it right to say what I have said.

It seems to me that in those two sets of circumstances we are dealing with two entirely different problems giving rise to entirely different considerations. We are dealing here with a breach of trust of the second character, where money has been realized—not realized improperly so far as realization goes,—but it is invested in breach of trust in unauthorized securities, or appropriated to the use of the trustee. The distinction between the two cases is drawn by the Master of the Rolls in *Stroud* v. *Gwyer* (1), as is pointed out by the Vice-Chancellor himself when he says he cannot follow it. If the learned Vice-Chancellor failed to understand the distinction, and that distinction is the foundation of the Master of the Rolls' judgment, I venture to think that we, or those who can understand the distinction, may very well arrive at a different conclusion.

I must say one word more about *In re Hill* (2) to see what really was determined, because when that case is examined I doubt whether it has a very strict bearing on this case apart from what I have already said. There was a marriage settlement there, of which the plaintiff was tenant for life, and a

(1) 28 Beav. 130. (2) 50 L. J. (Ch.) 551.

covenant by the father to pay the sum of 15,500*l.* He was a wine merchant. He did not pay any part of the 15,500*l.* during his life, but in some way which is not explained in the report 5500*l.* was satisfied either in his lifetime or afterwards: 10,000*l.* remained unpaid, and that was appropriated, according to the report, to the plaintiff and placed to her capital account in the books of the firm. The plaintiff, of course, was not entitled to the money at all. When it is said in the report that the money was appropriated to the plaintiff, I take it that means in satisfaction of the money which was settled on her and on her children, and the plaintiff is only mentioned there as the representative of those entitled under the settlement. Then a new partnership was created in which the plaintiff was joined. She was one of the partners and treated, apparently, as the owner of the 10,000*l.*, which, of course, she was not, and her husband, Captain Hill, acted as manager of the London business of the firm, whose principal business was abroad, and moneys coming to her in respect of her share were remitted to him. It seems that the business was a highly successful one, and there was remitted to Captain Hill, not only the interest on the 10,000*l.* in the shape of profits divisible, but large accumulations of profits in excess of the interest on the 10,000*l.* Then Captain Hill having died, he having received all these large sums, a question arose what claim ought to be made against his estate. The plaintiff wished to have interest at 5 per cent., but the trustees of the settlement wished to get as much for corpus as possible, and they submitted that the plaintiff was only entitled to interest at 4 per cent. on the original 10,000*l.*, and that all the accumulations should be regarded as capital. The Vice-Chancellor devotes some part of his judgment to considering whether the interest should be 4 per cent. or any other rate, and also the question arose what should happen to all the accumulations. But it seems to me, as I wish to point out, that the accumulations stood in a very different position from that which we are dealing with here, namely, interest on the money received by, or credited to, the defendant William Chaine. The accumulations might very well be regarded as accretions to capital, and as standing on an entirely different footing. I am not sure that the Vice-Chancellor did not so regard them,

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particularly because at the end of his judgment he says this (1): "Then it was contended in argument that these moneys or some of them were received substantially by the wife, and then paid over by her to the husband, so that no claim in respect of them can be tenable." Then he says: "What I have said as to treating them as capital of course disposes of that also, because if they are capital they are subject to the trusts of the settlement, and there is an end of it. But independently of that I should have great difficulty indeed in a case of this kind in coming to the conclusion that this lady, a married woman, restrained from anticipation, has, under the circumstances which are before me, deprived herself of the right to assert that those sums ought to be treated as capital, and therefore subject to the trusts of the settlement. That would seem to me to be getting behind the restraint upon anticipation very substantially." It seems to me reasonably clear that he is regarding these accumulations as a necessary part of the capital, and that he is not deciding, as against *Stroud* v. *Gwyer* (2) or against any other case, or against any other principle, that the money received qua interest could be recovered as capital for the benefit of the trust estate. Anything in the nature of accretions to capital stands on an entirely different footing. Those entitled to capital do not recover these accretions from the trustee on their own merits because they are anything which they have earned or which belonged to them from any exertions of their own, but because they have been earned by the trustee in consequence of the breach of trust, and therefore, on the elementary principles of equity, they cannot be allowed to be retained by him. Therefore the accretions become part of the trust estate, and becoming part of the trust estate they necessarily become capital. That seems to me to have no reference to the interest here. The trustee, of course, must account for it; he cannot retain it himself; but he can say, "I have paid it to the tenant for life." That seems to me a reasonable answer to those who seek to attribute it to the corpus.

There is only one other authority, and the report, unfortunately, only consists of a statement of what Byrne J. decided.

(1) 50 L. J. (Ch.) 554. (2) 28 Beav. 130.

That is the case of *In re Appleby*. (1) The case is reported in the Court of Appeal, as is often convenient, without any lengthened report of the case before the learned judge in the Court below. It is there said: "The first question argued was whether a trustee who had paid the whole of the income arising from investments made, not by the testator, but by the trustees, and not authorized by the terms of the will, to a tenant for life, could be called upon to repay to the estate, though no loss had been thereby occasioned to the capital, so much of the income as exceeded the amount which would have arisen if the fund had been properly invested in authorized securities." That is exactly the question I have to decide here. It happened that there it was the case of a will, but as regards a circumstance of that character there is no distinction between a will and a settlement when the question is not what was left by the testator, such as leaseholds or long annuities, but what was done by the trustees with property which they had already invested and realized. Then the report says this: "And on this Byrne J., on June 24, 1902, held, on the authority of *Stroud* v. *Gwyer* (2), which he considered indistinguishable from the present case, and notwithstanding *In re Hill* (3), that the trustee was not liable to repay, or account for, any excess of income so paid." There I have, in a short form, a very distinct expression of opinion by the learned judge on the very point I have to decide. He has followed *Stroud* v. *Gwyer* (2), and he says notwithstanding *In re Hill*. (3) If the view which I have endeavoured to explain is correct, one may come to the conclusion I have come to notwithstanding *In re Hill* (3), because that case really does not touch the question I have to decide. *Stroud* v. *Gwyer* (2) is a distinct authority on the point, and it has been followed distinctly by Byrne J., and I think that I, too, ought to follow it.

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The plaintiffs appealed. The appeal was heard on January 30 and 31, 1908.

C. A.

Stewart-Smith, *K.C.*, and *Ribton*, for the appellants. Colonel Chaine having misappropriated the trust fund, and applied it in

(1) [1903] 1 Ch. 565. (2) 28 Beav. 130.
(3) 50 L. J. (Ch.) 551.

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paying off the loan by the bank, became liable to restore it with interest at 5 per cent. The fund remained in peril from 1882 till 1902, and the higher rate of interest charged during that time is compensation for the risk incurred; and, inasmuch as the risk is incurred not only by income, but by capital, capital is entitled to a part of that compensation. The tenant for life is entitled to what is contracted for by the settlement and no more, and it is not open to a trustee to increase the benefits which the tenant for life takes by his breach of trust. It follows that Mrs. Chaine is entitled to so much only of the 5 per cent. interest on the 8000*l.* as would have been earned by that sum if it had been invested in conformity with the provisions of the marriage settlement, and that the remainder ought to be treated as part of the capital of the trust funds: *Baynard* v. *Woolley* (1); *Davies* v. *Hodgson* (2); *In re Hill.* (3)

Kekewich J. proceeded upon *Stroud* v. *Gwyer* (4), but that case was criticized by Hall V.-C. in *In re Hill* (3), and it is not binding on this Court. This question may therefore be treated here as a matter of principle.

[BUCKLEY L.J. *Stroud* v. *Gwyer* (4) was recognized as an authority by Lindley L.J. in *Chillingworth* v. *Chambers.* (5)]

That was not on this point; the Court was not there dealing with the relation of income and capital. Further, Mrs. Chaine's title to the income of the fund accrued before the coming into operation of the Married Women's Property Act, 1882, and she was not entitled for her separate use, and, in effect, the husband has been paying himself; but it is a settled rule of equity that a trustee cannot make a profit out of his trust.

[The following cases were also referred to: *Cox* v. *Cox* (6); *Piety* v. *Stace* (7); *In re Van Straubenzee* (8); *Robinson* v. *Robinson* (9); *Docker* v. *Somes.* (10)]

P. O. Lawrence, K.C., and *Vaughan Hawkins*, for the respondent Colonel Chaine.

(1) (1855) 20 Beav. 583.
(2) 25 Beav. 177.
(3) 50 L. J. (Ch.) 551.
(4) 28 Beav. 130.
(5) [1896] 1 Ch. 685, 695-6.
(6) (1869) L. R. 8 Eq. 343.
(7) (1799) 4 Ves. 620.
(8) [1901] 2 Ch. 779.
(9) (1851) 1 D. M. & G. 247.
(10) (1834) 2 My. & K. 655.

COZENS-HARDY M.R. This appeal raises a point of law which certainly I thought was well settled half a century ago. The point is really this: whether in the case of a settlement, not by will but by deed, to which, therefore, the rule in *Howe* v. *Earl of Dartmouth* (1) has no application, when the trustees of the settlement make an unauthorized investment and then make good to the trust estate the entire fund, capital with interest, including a penal rate of interest, if you like, 5 per cent., the reversioners or remaindermen can make any claim to the excess of interest so paid by the trustees in addition to the 4 per cent. or 3 per cent., or whatever may be the rate, which would have been produced by an authorized investment. On principle why should any such claim be allowed? There has been no loss ex concessis to the capital of the estate. There has been no profit made by the trustee by his breach of trust ex concessis, because he has paid both capital and interest to the trust estate. In these circumstances I entirely fail to appreciate any principle on which it can fairly be held that any part of the interest which has been paid by the trustee in addition to the full capital is an accretion to the capital of the trust fund.

This is not a case in which the beneficiaries elect to take the benefit of the unauthorized investment with all its risks or to repudiate it. They want to do something betwixt and between, and that the law will not allow. But fortunately the case is covered by an authority which, though not binding upon this Court, commends itself so strongly to my mind that I should hesitate very much before I departed from it. It is the case of *Stroud* v. *Gwyer* (2), decided by Romilly M.R. in 1860. That case raises the precise point, and the Master of the Rolls deals with it in two or three passages of his judgment which I will read. There the trustees without authority lent trust moneys at interest at 5 per cent., and it was held that the tenant for life was entitled to the whole interest, and that the remaindermen had no right to insist that the excess of the interest beyond the dividends which would have been produced if the money had been invested in Consols formed capital. The first passage which I propose to read is as follows (3): "I am

(1) 7 Ves. 137a. (2) 28 Beav. 130.
(3) 28 Beav. 140.

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not aware of any case in which it has been held, that where the executors have allowed the tenant for life to invest money in a decaying security, or upon a security which produced a greater amount of interest than that which was produced by the fund at the date of the testator's death, this Court has ever made the tenant for life account for the profits made by the employment of the money in business, or has ever made the executors or trustees liable for that amount." Then, later on, he says (1): "When trustees or executors commit a breach of trust by lending it"—i.e., the trust fund—"on some unauthorized security, then I am of opinion they have discharged their liability in favour of the cestuis que trust who are entitled to the capital in remainder, when they have made good the capital and any increase which that capital has received." Then at the end of the judgment (2), referring to *Dimes* v. *Scott* (3) (which was a case to which the rule in *Howe* v. *Earl of Dartmouth* (4) applied), he said: "I cannot allow it to be employed as an authority for the case of an advance made by executors and trustees to other persons, however improper that advance might be, and in breach of trust, and hold, that the increased profit thereby made is to be divided partly between capital and partly between income, and that the excess of it is to be turned into capital for the benefit of the persons entitled in remainder." That, of course, is exactly the present case, and I have heard no argument which has shaken me in the conviction that that decision was perfectly right. It was followed by Byrne J. in *In re Appleby* (5), and, although in the report of that case we have not his reasoned judgment, we have the effect of the order which he there made. This branch of the law was very carefully considered by Kekewich J. in the judgment now under appeal, and I think it would be almost a waste of time if I were to do more than say that I entirely agree with that judgment. What I have said does not in any way qualify or vary one sentence of the judgment. I, therefore, think that no part of this interest is capital and that the appeal fails.

(1) 28 Beav. 141.
(2) Ibid 144.
(3) 4 Russ. 195.
(4) 7 Ves. 137a.
(5) [1903] 1 Ch. 565.

It is said that some distinction ought to be drawn because the tenant for life was the wife of the trustee, and was not entitled for her separate use, but the husband was entitled in her right. I entirely fail to see how that can make any difference in this case.

FLETCHER MOULTON L.J. I am of the same opinion.

BUCKLEY L.J. The point for decision may be stated thus:— Assume that a trustee has misappropriated trust funds to the extent of 1000*l.*, and that he is found liable for the 1000*l.* with interest at 5 per cent., say 50*l.* He pays the 1000*l.*, and the tenant for life under the settlement releases the 50*l.* Is he discharged? Assuming that the 50*l.* belongs to the tenant for life, the case is exactly the same as if the trustee had paid that 50*l.* The question, therefore, is whether the 50*l.* belongs to the tenant for life. If the settlement be one by which the tenant for life is limited in respect of the income to such income as is produced by the trust funds when invested in authorized investments, or is limited in some way which gives the corpus under some circumstances the right to income in excess of a defined or ascertained amount, a question might arise which does not arise here. The trusts of this settlement are to collect, get in and receive certain funds when they fall into possession, to invest in certain investments which are named, and then the trust is "to pay the dividends interest and annual income of the said trust funds," &c. Suppose the funds had fallen into possession and had not been invested at all, the trustee might have been called on to pay a sum by reason of his default to invest, and the tenant for life would get that. The tenant for life is entitled to the income of the trust funds, which ought to have been put in authorized investments. But there is nothing here to confine the tenant for life to the income of the authorized investments. She is entitled to the income, whatever be the income properly ascertained, of the trust funds in the settlement. What happens is this: The 1050*l.* is recovered from the trustee. He pays the whole of it, the 1050*l.* It makes no difference as regards the 50*l.* that that is done by way of release. The 1000*l.*

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is recovered as corpus, and the 50*l.* is recovered as income. The only way, in my opinion, in which corpus can assert any right whatever to the 50*l.* is upon the principle that corpus has a right to look to the hazardous investment, with its consequent high return by way of interest, as a security for what is due to corpus, or, to express it in a concrete form, has a right to look to the whole of the judgment for 1050*l.* as security for what is due to corpus. I dare say it has. But income is also entitled to look to the whole of the judgment as the proper source for payment of what is due in respect of income. When the trustee has paid the money all question of security is over, and it seems to me that that which is recovered as corpus is corpus, and that which is paid as income is income. If the trustee were not solvent the reduced amount which he was able to pay and did pay would no doubt have to be apportioned as between corpus and income. It is unnecessary to say how such an apportionment should be made, not that I have any doubt upon it, but the point does not arise here, as he has paid in full. It seems to me that the matter is free from doubt and difficulty, and that the 1000*l.* has been recovered as corpus and the 50*l.* has been recovered as income. That appears to me to be the right ground on principle. But I agree with what the Master of the Rolls has said, that this has been decided long ago in *Stroud* v. *Gwyer* (1), which was followed by Byrne J. in *In re Appleby* (2) and was referred to by Lindley L.J. in *Chillingworth* v. *Chambers* (3), and, although he referred to it on another point, he did not intimate any possible dissent from that decision. I think that *Stroud* v. *Gwyer* (1) is good law.

Solicitors: *Field, Roscoe & Co., for Senior & Furbank, Richmond, Surrey; Farrer & Co.*

(1) 28 Beav. 130. (2) [1903] 1 Ch. 565.
(3) [1896] 1 Ch. 685.

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Jan. 31
Feb. 1.

[1907 G. 1781.]

Master and Servant—Contract of Service—Repudiation—Wrongful Dismissal—Undertaking by Servant not to trade within certain Limits—Breach—Right of Master to sue.

Where a contract of service provides that the servant shall hold office subject to termination on notice for a given period, and the servant is wrongfully discharged without notice, he may elect to treat the contract as completely at an end, retaining his right to bring an action for the breach, and is no longer bound by a clause in the contract restrictive of his right to trade on the termination of his engagement.

Appeal from a decision of Neville J.

The plaintiffs the General Billposting Company were assignees under an indenture of October 31, 1906, of the business of bill-posters and advertising contractors formerly carried on by the plaintiffs the Newcastle and District Billposting and Advertising Company, Limited, at Newcastle-upon-Tyne and in the adjoining district. By an agreement of service dated February 28, 1901, and made between the last-named company and the defendant, it was provided (clause 1) that the defendant should be manager and secretary of the company; (clause 2) that he should hold office subject to termination at twelve months' notice in writing given by either party to the other; (clause 3) that the defendant should devote the whole of his time to the business of the company, and should obey the orders of the board of directors, and should well and faithfully serve the company; and (clauses 4—8) that his salary should be 250*l.* per annum, with an additional bonus in certain events.

Clause 9 was as follows: "The said Thomas Anthony Atkinson shall not whilst in the engagement or within two years after his engagement with the said company terminates commence the same or a similar business or accept a situation as manager or

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assistant to any person or company in a similar business to the company within a radius of fifty miles from the registered office of the company unless he receive written permission from the company to do so and if he does so without such permission as aforesaid he hereby agrees to pay to the company the sum of 250*l.* as and for liquidated damages and not by way of penalty (without the company proving or being required to prove any special or other damages) and shall be restrained from so doing by an injunction of any Court having jurisdiction."

The defendant continued in this employment until March 28, 1906, when he was dismissed without notice. He thereupon commenced an action for wrongful dismissal against the Newcastle Company, and on July 10, 1906, obtained a verdict for 350*l.*, being the amount of a year's salary and bonus calculated in the manner provided by the agreement. In October, 1906, he commenced business in Newcastle as an advertising agent. In June, 1907, he sold his business to a company incorporated under the name of Thomas Atkinson, Limited, and since that time the business had been carried on under the defendant's management. Neither of the plaintiff companies ever consented to the defendant carrying on the business. In September, 1907, this action was commenced for an injunction and damages in respect of the alleged breach by the defendant of clause 9 of the agreement of service. The claim for an injunction was, however, not persisted in at the trial.

Neville J. was of opinion that the plaintiffs, notwithstanding the wrongful dismissal of the defendant, were entitled to sue upon clause 9 of the agreement, and he accordingly gave judgment for the plaintiffs for 250*l.*, the amount of damages mentioned in the clause, and costs.

The defendant appealed.

Manisty, K.C., Peterson, K.C., and *Dighton Pollock*, for the defendant. After the wrongful repudiation of this contract by the employers the servant was entitled to treat it as determined for all purposes, and he ceased to be bound by the restrictive provisions of clause 9: *Boston Deep Sea Fishing and Ice Co.* v. *Ansell.* (1)

(1) (1888) 39 Ch. D. 339, 365.

Proctor v. *Sargent* (1) is not an authority against this contention, because there was there no wrongful dismissal. No doubt that case contains an obiter dictum by Tindal C.J. to the effect that if the defendant was discharged without notice he should have brought a cross action, and not have relied upon that as a defence to a suit to enforce a provision in the contract of service similar to the provision now under consideration; but that was not indorsed by the other judges, and against that dictum may be set the dictum of Maule J. that the consideration for the promise by the defendant is the promise of the plaintiff to fulfil the agreement on his part. In *Norman* v. *Willetts* (2), where the Court granted an interlocutory injunction, the question whether the dismissal was wrongful or not was not determined. In *General Accident Assurance Corporation* v. *Noel* (3) the point was neither argued nor decided.

[They were stopped.]

Bramwell Davis, K.C., and *G. M. Hildyard*, for the plaintiffs. Although there is no direct authority on the point, the dicta of Tindal C.J. in *Proctor* v. *Sargent* (1) are strongly in favour of the plaintiffs, and *Norman* v. *Willetts* (2) points in the same direction. If the contract is wrongly determined by the master, the proper remedy is an action for damages, but that does not free the servant from his obligation under a covenant not to trade after the termination of the contract such as is to be found in clause 9 of this contract. Clause 9 speaks of the termination of the contract simply, so that the question whether the termination is rightful or wrongful is immaterial. The question on principle is, Does the wrongful dismissal go to the whole root of the contract? Where there are several branches in a contract the repudiation of one branch does not put an end to the other branches: *Franklin* v. *Miller*. (4) Here there are two entirely independent branches, one the employment of the servant, the other the covenant not to carry on a similar trade after the termination of the engagement. If the plaintiffs were asking for an injunction, the Court might well refuse to grant that relief on equitable grounds, but there is here no question of equity; the

(1) (1840) 2 Man. & G. 20.
(2) (1897) 13 Times L. R. 264.
(3) [1902] 1 K. B. 377.
(4) (1836) 4 Ad. & E. 599.

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plaintiffs are merely asking for their common law remedy of damages.

[BUCKLEY L.J. How can it be said that the wrongful determination of the employment in a contract for employment does not go to the whole consideration? If your contention is right, the plaintiffs would have been entitled to damages from the defendant if they had discharged him on the first day.]

That is a different case. Here the contract has been partially performed. The breach of contract by the employers is covered by the damages obtained in the action for wrongful dismissal, and in estimating those damages the jury must have taken into account the obligations of the servant under this restrictive covenant. [They also referred to *Johnstone* v. *Milling*. (1)]

COZENS-HARDY M.R. This is an appeal from a decision of Neville J., who has given judgment in favour of the plaintiffs for a sum of 250*l*. It raises a point of some general interest. A contract was entered into in 1901 between the Newcastle Billposting Company, who are one of the co-plaintiffs, and Atkinson, who is the defendant in the action and the appellant here. By clause 1 Atkinson was to be manager and secretary of the company, and by clause 2 he was to hold office "subject to the termination on twelve months' notice in writing given by either party to the other." In fact, there has been a transfer of the business of this company to another company, but, in view of the point which alone is before us, that is not material for consideration, and I shall treat the Newcastle Company as though they were the sole plaintiffs and were still carrying on the business of which Atkinson was to be the manager. In March, 1906, Atkinson was summarily dismissed by the company. He alleged that that was a breach of contract, and he brought an action against the company for wrongful dismissal. That was tried before Pickford J., then Mr. Commissioner Pickford, and the jury gave a verdict for the plaintiff and awarded him damages to the extent of 350*l*. The plaintiffs are therefore estopped

(1) (1886) 16 Q. B. D. 460.

from disputing that they wrongfully dismissed the defendant in March, 1906. They entirely refused from that time forward to perform any part of the obligations resting upon them by virtue of the contract. In that state of things this action was brought last September for an injunction and damages. I say nothing about the injunction, because the claim for an injunction was obviously hopeless; but it is said that the plaintiffs can claim damages because the defendant committed a breach of clause 9 of the agreement, which is in these words. [His Lordship read the clause, and continued:—] Neville J. has held that, although the plaintiffs so long ago as March, 1906, absolutely declined to perform their part of the contract and to employ the defendant any further, and although they did that wrongfully, yet they are still entitled to claim damages for breach of clause 9. With great respect to the learned judge, I am entirely unable to accept that view. It seems to me that it is impossible for me to put the case more accurately or in better language than it was put by Bowen L.J. in *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1), in a passage in which he dealt with the question what was the true effect of terminating the relation of master and servant. He says: "Some confusion always arises, as it seems to me, from treating these cases between master and servant as instances of a rescission of the original contract. It is not a rescission of the contract in the sense in which the term ordinarily is used, viz., that you relegate the parties to the original position they were in before the contract was made. That cannot be, because half the contract has been performed. It really is only a rescission in this sense, that an act occurs which determines the relation of master and servant for the future, and you may regard that determination in two ways; it is either a determination in conformity with the rights of the master which arise under the contract itself, there being, as I have said, in every contract of service an implied condition that if faithful service is not rendered the master may elect to determine the contract, and the determination takes place on that implied condition;"—that is to say, that the act which is done is within the contract—"or you may regard it under the more general law,

(1) 39 Ch. D. 365.

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which is not applicable to contracts of service alone—you may treat it as the wrongful repudiation of the contract by one party, being accepted by the other, and operating as a determination of the contract from that time, that is, from the time the party who is sinned against elects to treat the wrongful act of the other as a breach of the contract, which election on his part emancipates the injured party from continuing it further." Is it possible to find a more complete illustration of that proposition than the case before us? The contract, putting the matter shortly, on the part of the master was this: "I will employ you at a certain salary with certain duties until I give you twelve months' notice or you give me twelve months' notice." The contract on the part of the servant was: "I will serve you diligently and properly, and will obey your orders, and, when the service under the contract comes to an end, I will not carry on business within a certain area and for a certain period as stipulated in clause 9 of the contract." But when once you get a complete and total repudiation by the employer—not merely a breach of some of the obligations on his part, but a complete and total repudiation of everything that was to be done by him—surely that is a wrongful repudiation of the contract which the servant is entitled to accept, and from thenceforward he is free from every part of the contract, whether it be the obligation to obey the master's orders, and to do his duty under the contract, or the obligation to observe the covenant in clause 9. On principle, therefore, it seems to me that this is a case in which it is impossible for the plaintiffs either to get any relief of an equitable nature or to maintain a claim for damages, because the contract has been repudiated by one party, and the repudiation has been accepted by the other party, as long ago as March, 1906.

But then it is said there is authority to the contrary, and reference is made to *Proctor* v. *Sargent*. (1) But when that case is examined it is clear that it is not an authority upon this point at all. It arose upon demurrer, and the declaration stated that the plaintiff had always performed and fulfilled the agreement and all things therein contained on his part. So that there was an

(1) 2 Man. & G. 20.

allegation, which for the purposes of the demurrer must be taken to be true, that there was no breach and no repudiation of the contract on the part of the plaintiff, the employer. Tindal C.J., after dealing with the facts, says this (1): "The breach alleges that the defendant, within twenty-four calendar months 'after his quitting and being discharged'"—that is a reference to a clause corresponding to clause 9 in this case—"'did commence,' &c. I should rather say, from those words, that the contract was regularly determined." That is to say, not wrongfully determined. Then he goes on to say this: "But if it was otherwise, and the defendant was discharged without a month's notice, he should have brought a cross action, and not have relied upon that as a defence to the present suit." That, of course, even giving it the full effect which we are asked to do by the respondents, was, at the most, a mere dictum not in any way necessary for the decision of the case, and it was a dictum which is not supported by the other members of the Court; but, as it seems to me, the opinions of the other learned judges, so far as there are any dicta on the point, were distinctly the other way. Bosanquet J. says (2): "The first point for our consideration is mere matter of form—whether it was incumbent on the plaintiff to shew in the declaration that the defendant was discharged in the way contemplated in the agreement. . . . . The objection is, that it does not appear that the plaintiff gave any notice in writing to the defendant, to determine the service. If it was the intention of the plaintiff to put an end to the service against the will of the defendant, he was to give the latter a month's notice, but there might be other grounds which would justify the plaintiff in determining the contract besides those specified." And further on he says, referring to the allegation in the declaration as to the defendant's discharge (3): "It appears to me, that the meaning to be attached to these words is, that the service was put an end to by the mutual consent of both parties, and that this brings the case within the terms of the agreement." Maule J. puts the matter very plainly, and in a manner which is entirely favourable to the

(1) 2 Man. & G. 32. (2) 2 Man. & G. 33.
(3) 2 Man. & G. 34.

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present appellant. Discussing the question of the sufficiency of the declaration, he says (1): "It is said that the consideration for the agreement, on the part of the defendant, is not duly alleged to have been performed by the plaintiff. The consideration for the promise by the defendant is, the promise of the plaintiff to fulfil the agreement on his part. Now the plaintiff has, in general terms, stated that he has performed the agreement; which is sufficient on general demurrer." It seems to me, even assuming that according to the true reading of the one passage in Tindal C.J.'s judgment it is a dictum in favour of the respondents' view, it is a dictum not concurred in by his colleagues, not supported by any other authority, and certainly not consistent with the observations of Bowen L.J. in the case of *Boston Deep Sea Fishing and Ice Co.* v. *Ansell.* (2) We were also referred to the case of *Norman* v. *Willetts* (3), before Stirling J., but that is a case which does not lend any support whatever to the respondents' contention. There the plaintiff, seeking an injunction to restrain a nurse from committing a breach of a clause of the same nature as clause 9, said that she had dismissed the nurse, the defendant, properly for misconduct. The nurse denied it, and said that there was no justification for her dismissal. The application before Stirling J. was on an interlocutory motion, and in those circumstances he did what, if I might say so, was obviously and manifestly just. He said, in effect: "I must grant an injunction until the trial with an undertaking in damages, and if at the trial the defendant proves that the dismissal has been wrongful, then of course damages will have to be paid by the plaintiff to the defendant upon the undertaking." There is, in my opinion, no authority whatever to support the claim of the plaintiffs in this matter; there is, in my view, no principle on which it can be justified; and I think, therefore, that this appeal must be allowed, and the respondents must pay the costs here and below.

I only wish to add that it must not be assumed that I think that the 250*l.* could properly be claimed as liquidated damages, or that it was anything else than a penalty.

(1) 2 Man. & G. 36. (2) 39 Ch. D. 339, 365.
(3) 13 Times L. R. 264.

FLETCHER MOULTON L.J. I am of the same opinion, and have nothing to add.

BUCKLEY L.J. We are differing from the learned judge, and for that reason only I will say a few words shewing the grounds of my judgment. There existed between the plaintiffs and the defendant a contract of service, and it included a clause restrictive of the defendant's right to trade after the termination of his engagement. I may take it that clause would have had effect if his engagement had been terminated in any way consistently with the agreement. It has been determined in litigation between the parties and by the verdict of a jury that the plaintiffs dismissed the defendant wrongfully; they refused to employ him further, and had no just cause for doing so, and they entirely brought to an end all their obligations under the contract. In their present action they seek to say that, notwithstanding that, the defendant remains liable to his obligations under the agreement, namely, the observance of the restrictive covenant in clause 9, and the obligation to pay damages for the breach of it. In my opinion that cannot be maintained. When the defendant brought his action for wrongful dismissal he was in no way setting up the contract. When the plaintiffs refused to perform the agreement, as Lord Esher says in *Johnstone* v. *Milling* (1), the defendant was entitled, if he pleased, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. He had a perfect right to sue for damages, although he was going to say that the contract was entirely at an end. It seems to me that what has taken place here is that the plaintiffs have elected not to perform the agreement on their part, and that it was competent to the defendant to say, "I take you at your word; the agreement shall be put an end to altogether, I retaining my right to sue you for the breach"—which he has done. The result is that clause 9 fell to the ground directly the plaintiffs committed a complete breach of all their obligations under the agreement by refusing to be further bound by it. I think,

(1) 16 Q. B. D. 467.

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therefore, that this appeal should be allowed and the action dismissed with costs.

Solicitors: *Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-upon-Tyne; Robinson & Bradley, for Lundi, Shortt & Fenwick, Newcastle-upon-Tyne.*

H. B. H.

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Feb. 1, 4.

NUGENT *v.* NUGENT.

[1905 N. 231.]

Receiver—Partition Action—Sale by Mortgagee—Purchase by Receiver without Leave of the Court.

A receiver appointed by the Court cannot purchase the property of which he is receiver without the leave of the Court, even where the sale is made, not in the action in which he was appointed, but by a mortgagee selling with leave outside the action.

Alven v. *Bond*, (1841) Fl. & K. 196, approved.

Decision of Swinfen Eady J., [1907] 2 Ch. 292, affirmed.

APPEAL from a decision of Swinfen Eady J. (1)

The facts are rather more fully stated in the report of the case in the Court below, but the following summary is sufficient for the purposes of this report.

In May, 1905, the defendant in a partition action, and a part-owner, was appointed receiver of the rents and profits of a house at Hove.

In November following a mortgagee, whose interest was in arrear, obtained an order giving her liberty as mortgagee (notwithstanding the appointment of the receiver) to enter and take possession and to exercise the power of sale by public auction. The mortgagee, as a fact, did not take possession, but put the house up for sale by auction.

In January, 1906, the defendant, without obtaining the leave of the Court, instructed an agent to bid at the auction, and purchased the house for 3500*l*. The defendant claimed to retain the house under her purchase.

(1) [1907] 2 Ch. 292.

Swinfen Eady J. held that the defendant, as receiver, could not purchase the property of which she was receiver without the sanction of the Court, even where, as in this case, the sale was made by a mortgagee selling with leave outside the action.

The defendant appealed.

Hon. E. C. Macnaghten, K.C., and *Bischoff*, for the appellant. In this case the sale was carried out by a mortgagee selling with leave outside the action; this distinguishes the case from *Alven* v. *Bond* (1), where the sale was effected under a decree in the action, so that the receiver had some control. For the purposes of this sale the receiver was an absolute stranger, with no duties or advantages to prevent her purchasing the property, which, after all, was only a house at Hove, as to which no special knowledge was necessary to arrive at its true value.

[COZENS-HARDY M.R. referred to *Ex parte James.* (2)]

The defendant was not in a fiduciary relationship to the other parties in the partition action so far as this sale was concerned. The mortgagee's exercise of the power of sale had put an end to the receivership for all further practical purposes. The fact that the defendant was one of the tenants in common is immaterial: *Kennedy* v. *De Trafford.* (3)

Had the sale been made in the partition action the receiver could not have purchased, but as it was made by a mortgagee the case is different. There is no suggestion here of any undue advantage having been taken.

Jenkins, K.C., and *J. S. Green*, for the respondents, were not called upon.

COZENS-HARDY M.R., after stating the nature of the appeal, continued:—First of all, it is important to remember that the Court, in dealing with this class of cases, does not proceed upon the footing that there has been fraud or improper concealment, or any special advantage taken by the receiver; but it proceeds upon the general rule that in cases of this kind the purchase ought not to be allowed at all, because it is a dangerous thing to

(1) Fl. & K. 196. (2) (1803) 8 Ves. 337.
(3) [1896] 1 Ch. 762.

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allow, as in most cases it is impossible to ascertain whether the receiver has or has not taken undue advantage of his position. It must not therefore be assumed because I think the judgment of Swinfen Eady J. is right, that I therefore consider there has been any real fraud on the part of the defendant in this case.

Now, what is the position here? There is a partition action asking for a sale in which a receiver has been appointed, namely, the defendant in the action: the property was subject to a mortgage; the mortgagee had a power of sale; the mortgagee could not enter upon the property which was in the possession of the receiver without obtaining the leave of the Court; and she therefore applied for an order to allow her, in effect, to turn the receiver out of possession. The Court made that order, and made it upon very special terms, to which I attach some importance, although I desire to say I do not base my judgment on the terms of that order. By that order the mortgagee not merely got liberty, notwithstanding the appointment of the receiver, to enter and take possession of and receive the rents and profits, but the order went on, "To exercise her power of sale by public auction and to lodge the proceeds of sale in Court after deducting principal, interest and costs"; that is to say, she consented to an order really limiting the power of sale by agreeing to sell only by auction, and then to pay the balance into Court, provision being made that she should only get the costs of the application under the summons if and when she did pay the balance into Court. The property was put up for sale by the mortgagee under that order, and it was purchased by the receiver. Now, what is the position of the receiver towards the beneficiaries in this case? Plainly a fiduciary one. That cannot be disputed. It makes no difference whatever that the receiver here was one of the tenants in common. In that character alone she would not have filled a fiduciary position, but a receiver must be in a fiduciary position to all the tenants in common, and it makes not a farthing difference whether the receiver was herself one of the owners. On what ground, then, can this case be taken out of the usual rule? I fail to see any. The receiver being in this fiduciary position, having full

knowledge and special opportunities of knowing the rentals of the property and the other circumstances, was just in that position which brings the case, and brings it very plainly and strongly, within the rule of the Court that a person in a fiduciary position, having special means of knowledge, ought not to be allowed to buy or to bid for the property without the leave of the Court. It is said, and there is a great deal of plausibility in the argument, that this, after all, was merely a house in Hove about which there would be no special knowledge. I think we ought to decline to go into that, because when once we arrive at this point, that the doctrine of the Court does not depend on the fact of undue knowledge, but merely on the probability of it, and that the man is in a position where his duty and interest are in conflict, we ought not to consider whether, under the special circumstances of the particular property, there is any great probability of fraud. I have not yet referred to *Alven* v. *Bond* (1), the authority upon which Swinfen Eady J. acted, but that case is an authority, as it seems to me, directly and clearly in point. I think it is good law, and I think Swinfen Eady J. was perfectly right in the view which he took in following it, and in deciding that this purchase could not be supported. I am not sure that there is not an even stronger and better authority by a very great judge in *Boddington* v. *Langford* (2), where Sir Edward Sugden, when Irish Lord Chancellor, seems to have held, although his reasons are not given, that a purchase by a receiver of a jointure upon the lands over which he was receiver enured for the benefit of the persons entitled to the estate.

For these reasons I think the judgment of Swinfen Eady J. was right, and that this appeal must be dismissed with costs.

Fletcher Moulton L.J. I am of the same opinion. There is no doubt as to the general principle which actuates the Court in deciding its procedure in matters of this kind. It is that nobody must allow himself to get into a position where his interest conflicts with his duty. The Court carries out this principle, not by examining each particular case and weighing the details of the

(1) Fl. & K. 196, 213. (2) (1845) 15 Ir. Ch. Rep. 558, n.

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conflict between interest and duty, but by certain prohibitions with regard to persons who hold positions in which such a conflict might arise; and the Court has been very severe in past times in rules which it has made for this purpose, as, for instance, in the rule that a party to a suit cannot, without leave, bid at a sale by auction in the action. Now, if the Court feels justified in establishing such a rule with regard to parties in a suit, it seems to me much easier to justify a like rule with regard to the officers of the Court, who, by the action of the Court, coupled, of course, with their own consent, have been put in a fiduciary relation to the parties in the suit. That was the case here. The receiver was in a fiduciary relation to all the parties to the partition action, and she, by reason of accepting that position, might obtain knowledge which otherwise she would not possess. Having accepted that position, I think the Court has full right to control her actions, and to say that if a sale of the property takes place, whether it be in the suit or not in the suit, she must not be allowed to bid without the express leave of the Court.

For these reasons I think the appeal must be dismissed.

BUCKLEY L.J. I am of the same opinion. I rest my judgment on the following grounds. A person standing in a fiduciary relation cannot be allowed to put himself in a position in which his interest and his duty may conflict. If he does so, it is not necessary to shew that he acted contrary to his duty. The Court will not allow him to buy if the position is such that he might be guilty of a breach of his duty. When the mortgagee is selling, the mortgagor may no doubt owe no duty to the mortgagee to assist him in the sale, but if he knows something that may improve the price it would be his interest to put it forward. The receiver, who stands in a fiduciary relation to the mortgagor or the parties to the action constituting the mortgagor, owes to those parties the duty to do what is reasonably necessary to assist the sale. If, for instance, the mortgagee comes to the receiver and asks for information, the receiver owes to the mortgagor the duty of giving true information to the mortgagee so as to assist the sale. Sir Michael O'Loghlen in *Alven* v. *Bond* (1)

(1) Fl. & K. 196.

puts this case, which it seems to me is strictly in point. He says (1) it would be very dangerous to allow a receiver who may be employed in the preparation of the rental to be used at the sale (which every one knows to be one of the most important documents on such an occasion) to become the purchaser of the estate without the sanction or knowledge of the Court. "Very great powers are given to, and much confidence placed in this officer, who is placed in a situation which would enable him, if inclined to act dishonestly, by reducing the rental or lettings under the Court, or otherwise, to bring to a sale under very disadvantageous terms, the property confided to his care, and thus become the purchaser at an undervalue." Suppose the mortgagee had come to the receiver and said, "For the purposes of my sale, I want to know what the rents are," the receiver would have owed the parties to the suit the duty of telling truly what the rents were, and of not undervaluing them. If he were going to buy, it would be his interest to say they were less than in point of fact they were. If that is so, of course interest and duty would conflict. Under those circumstances it seems to me that, upon principles common to all this class of cases, the receiver cannot buy without the leave of the Court.

Solicitors: *Greenwood & Greenwood; Hicks, Arnold & Mozley.*

(1) Fl. & K. 213, 214.

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In re GLUKMAN.
ATTORNEY-GENERAL *v.* JEFFERYS.

[1906 G. 949.]

Will — Construction — Executors — No Next of Kin — Residue undisposed of—Beneficial Title of Executors—Equal pecuniary Legacies to all—Unequal specific Legacies to some—Presumption of Intention.

In a case where there are no next of kin, the executors are beneficially entitled to the undisposed-of residuary personal estate, unless the will shews a contrary intention. It is settled law that such an intention will be inferred from the gift of a pecuniary legacy to a sole executor, or of equal pecuniary legacies to all the executors, but when once there is inequality, whether in respect of pecuniary legacies or in respect of specific legacies, then there is no presumption of a contrary intention sufficient to displace the legal title of the executors, and they will take the residue beneficially.

Decision of Swinfen Eady J., [1907] 1 Ch. 171, reversed.

Appeal from a decision of Swinfen Eady J. (1)

The question raised by this appeal was whether, in default of next of kin, the executors were beneficially entitled to their testator's undisposed-of residue, or held it as trustees for the Crown. The facts are given in greater detail in the report of the case in the Court below, but the following statement is sufficient for the purposes of this report.

Leone Glukman, by his will of September 15, 1881, appointed George Jefferys, Manuel Cardenosa, and Clair James Grece to be his executors, and after giving a number of pecuniary legacies, including 1000*l.* each to Manuel Cardenosa and Clair James Grece, the testator proceeded: "All my foreign decorations I bequeath to Manuel Cardenosa my diamond ring (a present to me from the Emperor of Russia) to the said Clair James Grece and also my keyless repeater gold watch." He then gave a number of other legacies, including a legacy of 1000*l.* to J. Burton in trust for his children, a legacy of 1000*l.* to George Jefferys, and directed all the above legacies to be paid as soon as conveniently could be after his decease.

The will did not contain any gift of residue.

(1) [1907] 1 Ch. 171.

The testator died in November, 1881, and his will was duly proved by all three executors.

In 1885 proceedings were taken for administration, in which an inquiry was directed who were the testator's next of kin and whether he left a widow.

In 1905 the Master certified that the testator left no widow, and that there was no sufficient evidence to shew whether there were any next of kin.

The Attorney-General took out a summons for a declaration that the surviving executor was a trustee for the Crown.

Swinfen Eady J. held that the unequal specific legacies were not sufficient to displace the presumption that the executors were not intended to take beneficially, and consequently that the surviving executor in this case was a trustee for the Crown.

The surviving executor, George Jefferys, appealed.

Cassel, *K.C.*, and *Ward Coldridge*, for the appellant. The Executors Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 40), does not apply where there are, as here, no next of kin, and the case must therefore be decided according to the old law. The old rule was that executors are prima facie entitled to undisposed-of residue unless there is "a strong and violent presumption" (as it has been called in some of the cases) to the contrary. Whenever the executors take unequal legacies, of whatever kind, the inference that they are not to take the residue is rebutted: *Blinkhorn* v. *Feast* (1); *Bowker* v. *Hunter* (2); *Oliver* v. *Frewen*. (3)

[COZENS-HARDY M.R. referred to the fuller statement of the will in *Blinkhorn* v. *Feast* (1) given in Belt's Supplement, p. 262.]

In *Griffiths* v. *Hamilton* (4) two out of the four executors had equal pecuniary legacies, and yet it was held that the executors were entitled to the residue. *In re Knowles* (5) is another case of unequal legacies, and it also decides that the title of the executor, as against the Crown, is not affected by the Executors Act, 1830; that Act was also recently considered in *In re Roby*. (6)

(1) (1750) 2 Ves. Sen. 27.
(2) (1783) 1 Bro. C. C. 328.
(3) (1785) 1 Bro. C. C. 590.
(4) (1806) 12 Ves. 298.
(5) (1880) 28 W. R. 975.
(6) Ante, p. 71.

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Saltmarsh v. *Barrett* (1), which is relied upon by the respondents, is distinguishable, because the gift in that case was upon trusts which did not exhaust the whole residue; and *Ommanney* v. *Butcher* (2), which is also relied on, turned on the special wording of the will. *Southcot* v. *Watson* (3) shews that the rule is the same whether the legacy be pecuniary or specific.

In *King* v. *Denison* (4) Lord Eldon expressed his disapproval of the doctrine that a legacy given to an executor deprives him of the residue, and said it ought not to be extended. The rule is very well stated in *Dacre* v. *Patrickson.* (5) [*Nourse* v. *Finch* (6) was also cited.]

It being clear, therefore, on the authorities that there is no difference between specific and pecuniary legacies so far as the doctrine now under consideration is concerned, if the gifts in this will are taken together, the executors take unequal benefits, and when once there is inequality, then there is no presumption of a contrary intention sufficient to deprive the executors of their legal title to the residue.

Sir W. S. Robson, A.-G., and *George Lawrence*, for the Crown. *Dicks* v. *Lambert* (7) and *Saltmarsh* v. *Barrett* (1) are cases where a legacy to one executor, or equal legacies to more than one, prevented the residue being taken beneficially, and they depend on what Sir Richard Arden in *Clennell* v. *Lewthwaite* (8) called the "violent presumption" to the contrary afforded by the gift of a part, that the testator did not mean the executors to take the whole. The old law is well stated in Cox's note to *Farrington* v. *Knightly* (9), and he states that a specific legacy to a single executor excludes him, but specific legacies of unequal values to several executors do not exclude them.

In the present will there are equal pecuniary legacies to all three executors; this gift brings the case within those authorities which have laid it down that equal legacies displace the executors' prima facie title, and the Crown is therefore entitled. The fact that there are also specific legacies to two of the executors makes

(1) (1861) 3 D. F. & J. 279.
(2) (1823) T. & R. 260.
(3) (1745) 3 Atk. 226.
(4) (1813) 1 V. & B. 260, 277.
(5) (1860) 1 Dr. & Sm. 182.
(6) (1791) 1 Ves. Jun. 344
(7) (1799) 4 Ves. 725.
(8) (1794) 2 Ves. Jun. 465.
(9) (1719) 1 P. Wms. 544, 549.

no difference—they would be taken out before arriving at the residue; besides, there may be a special reason for giving one specific article to one executor in preference to the other.

In *Muckleston* v. *Brown* (1) the fact of there being a devise of real estate to one executor did not make any difference, though the result was that there were unequal benefits to the executors, because one had real estate and the other had none. That case is very much in point here; for the purposes of argument real estate is just as much a benefit to one executor as the gift of a diamond ring is. On principle there is no reason why the gift of unequal specific legacies should affect the general and well settled rule.

Cassel, K.C., in reply.

Cur. adv. vult.

Feb. 14. COZENS-HARDY M.R. The testator Leone Glukman died leaving no next of kin. By his will he made no disposition of his residuary personal estate. He appointed three executors, to each of whom he gave a legacy of 1000*l.*, and he also made a specific bequest in favour of two of the three executors, but no similar bequest in favour of the third. Under these circumstances Swinfen Eady J. held that the executors did not take the residue beneficially, but were trustees for the Crown. From this decision the executors have appealed. The case is not affected by the Executors Act, 1830. It is governed by the old law. I do not think the old law can be better stated than it was by Kindersley V.-C. in *Dacre* v. *Patrickson* (2): "The rule, irrespectively of the statute, is clear. The appointment of executors is a gift to them of the personal estate; and a Court of Equity will not deprive them of the beneficial interest, unless it sees that a strong and violent presumption arises from the will, that the intention of the testator was that the executors should not virtute officii take the personalty; and if there is that violent presumption, then a Court of Equity holds the executors trustees for the next of kin. There have been a considerable number of cases in which the question has been, what circumstances afford a violent presumption. Among others it has been held, that if a legacy is given to the

(1) (1801) 6 Ves. 52, 64. (2) 1 Dr. & Sm. 184.

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executor, that affords the necessary presumption. So, if there are two executors, and there are equal legacies given to them; but if there are two executors, and unequal legacies are given to them, that does not raise a violent presumption. . . . . The question therefore is, whether, on the face of it, this will shews a strong presumption that the executor shall not take." There is no great difficulty in understanding the reasoning by which this result was reached in the case of a sole executor, for it is unreasonable to give a man a part if he is by the same instrument to take the whole beneficially. The extension to the case of two or more executors is more difficult to justify, for there is no necessary inconsistency between separate legacies to each of the executors and a gift of the residue to the executors jointly. But this must be taken as settled law. The original doctrine applied equally whether the legacy to a sole executor was specific or pecuniary, and in the case of several executors I see no reason why it should not apply if the specific bequests are equal, as, for instance, "a gift of one-half of my London and North Western Railway stock to one executor and a gift of the other half to the other executor." But when once you get inequality, whether in respect of pecuniary legacies or in respect of specific legacies, there is not sufficient to deprive the executors of their legal title to the residue or to hold that they do not take the residue beneficially.

I do not think it necessary to discuss the details of many old authorities which were cited to us. It is admitted that there is no authority precisely in point, but I have arrived at the conclusion that this is a case in which the executors take under the will unequal gifts by way of legacies, and, that being so, there is no presumption sufficient to rebut or to destroy their legal title. In my opinion the judgment of Swinfen Eady J. was wrong, and this appeal must be allowed.

FLETCHER MOULTON L.J. I have had an opportunity of reading the judgment which the Master of the Rolls has just delivered, and I concur in it.

BUCKLEY L.J. This testator appointed A., B. and C. his executors. He gave to B. a legacy of 1000*l.* and a specific legacy.

To C. a legacy of 1000*l.* and another specific legacy, and to A., describing him and him alone as "my executor," a legacy of 1000*l.* The case falls within the exception made by s. 2 of 11 Geo. 4 & 1 Will. 4, c. 40, and the question is whether, under the law apart from that Act of Parliament, the executors take the undisposed-of residue beneficially. I start with the presumption that the executors are intended to take the residue beneficially. "The fundamental presumption which the law makes, is, that the appointment of executors is a gift to them of what is undisposed of" (per Lord Thurlow, *Bowker* v. *Hunter*). (1) I have to look at the will to see whether it is thereby shewn that the executor is not intended to take beneficially. Lord Thurlow in *Bowker* v. *Hunter* (1) used the expression that the executor takes unless there is an "irresistible" inference to the contrary. But this expression would seem to be too strong. To displace the executors' right to the residue there must be "a strong and violent presumption to the contrary"—see Sir Richard Arden in *Clennell* v. *Lewthwaite* (2), and Lord Eldon in *Langham* v. *Sanford* (3)—or, in the words of Kindersley V.-C. in *Dacre* v. *Patrickson* (4), a "strong and violent presumption," or a "violent presumption," or a "strong presumption," for the Vice-Chancellor uses all three expressions.

If there be a sole executor and a pecuniary legacy be left to him, or—*Southcot* v. *Watson* (5)—a specific legacy be left him, it is settled law that he is excluded from taking the residue beneficially. The reason assigned is that it is absurd to give all and some; that by implication the testator, by giving part, expressly did not mean to give the whole impliedly: see *Blinkhorn* v. *Feast* (6), per Lord Hardwicke. Where there are two or more executors, and an equal pecuniary legacy is given to each, it is also decided that the executors do not take the residue beneficially, and this upon the same grounds as in the case of a sole executor. Lord Eldon in *King* v. *Denison* (7) expressed himself in terms which shewed that, although the above was settled law, the

(1) 1 Bro. C. C. 329.
(2) 2 Ves. Jun. 471.
(3) (1816) 2 Mer. 6, 17.
(4) 1 Dr. & Sm. 185.
(5) 3 Atk. 226.
(6) 2 Ves. Sen. 28.
(7) 1 V. & B. 277.

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principle had given to others, and it would seem gave him, but little satisfaction. Obviously in the case of a sole executor the gift of a pecuniary legacy would, in case the estate proved deficient, have the effect of entitling him to the abated amount of his legacy rateably with the other legatees. In the case of several executors with equal pecuniary legacies the same proposition is true, and there is to be added the consideration that each would take his pecuniary legacy separately, while all the executors would take the residue jointly. But these considerations must be dismissed, for the law in the two cases I have mentioned is settled. On the other hand, if there be two executors and unequal pecuniary legacies are given to them, as 200*l.* to A. and 50*l.* to B., the executors do take the residue beneficially: *Bowker* v. *Hunter*. (1) In that case "the difference of the legacies repels the presumption" (that is to say, the presumption in favour of the executors) "in favour of the next of kin" (that is to say, so as to give the beneficial interest to the next of kin). The same is true where the legacies to the executors are specific and unequal: *Blinkhorn* v. *Feast*. (2) For, to use Lord Hardwicke's language, the testator "might give these legacies for the sake of the inequality of division of his personal estate among these executors; . . . . for if it rested on the force of making them executors, it would be equally divided among them; to prevent which he takes out so much by way of particular legacies, giving such a mortgage to one, and such a mortgage to the other, the value of which is unequal."

In the present will there are—(*a*) equal pecuniary legacies of 1000*l.* given to each of the three executors; and (*b*) specific legacies of unequal amount given to two out of the three executors. The Attorney-General has pressed us with the argument that gift (*a*) brings the case within the authorities which I first mentioned, with the result, he says, that the executors do not take the residue beneficially; and then he adds, quite truly, that the fact that the specific legacies to B. and C. are to be taken out before arriving at residue is consistent with either view, namely, that the executors do, or that they do not, take the residue. This argument is based upon taking gift (*a*) first,

(1) 1 Bro. C. C. 328. (2) 2 Ves. Sen. 30.

ignoring for the moment gift (*b*), and then saying that there is no difficulty in making gift (*b*) consistent with it. But this is shutting one's eyes to the effect of the will as a whole. It is not the fact that the testator gives equal pecuniary legacies to each of the three. To the legacy of 1000*l.* in the case of A. he adds nothing; in the case of B. he adds a particular specific legacy, and in the case of C. another specific legacy. There is no absurdity in his thus giving different parts to each of the three and then giving the whole of what remains to the same three people. If there be two executors A. and B., and there be a pecuniary legacy of 1500*l.* to A. and of 1000*l.* to B., it is settled that there is no "strong presumption" against the executors, and they take the residue beneficially. If there be a gift of a pecuniary legacy of 1000*l.* and a specific legacy of a mortgage debt of 500*l.* to A., and a pecuniary legacy of 1000*l.* to B., how does this differ adversely to the executors from the former case? If there be a difference it would seem to be in favour of the executors, for there is no absurdity, but good reason for giving the 500*l.* mortgage debt separately and specifically to that one of the two executors whom the testator intends to benefit to that extent. The question I have to ask myself is whether in this will I find a "strong" or "strong and violent" presumption from the will itself that the intention of the testator was that the executors should not take the residue beneficially. I cannot find it. The presumption in favour of the executors is not, I think, displaced, and the result is that the executors are, and the Crown is not, entitled.

The order made by Swinfen Eady J. was therefore discharged, and a fresh declaration made to the effect that, on the true construction of the will, and in the events which had happened, the executors were entitled to the residue beneficially.

Solicitors: *Solicitor to the Treasury; Stanley, Woodhouse & Hedderwick.*

W. C. D.

JOYCE J.

1908

Jan. 11, 27 ; *Feb.* 4.

In re WALKER.

MacCOLL *v.* BRUCE.

[1907 W. 1841.]

Appointment — Limited Power amongst Donee's Children — Exercisable by Will—Special Formalities—Trust Fund—Donee domiciled in Scotland—Power duly exercised by Will—Subsequent Disposition of Part of Fund—Holograph Codicil—Defective Execution—Codicil valid by Law of Domicil —Probate in England—Defective Execution aided—Pro tanto Revocation of Prior Appointment—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 10—*Wills Act*, 1861 (*Lord Kingsdown's Act*) (24 & 25 *Vict. c.* 114).

The testatrix, a domiciled Scotswoman, was the donee of a special power of appointment over a trust fund in favour of her children exercisable "by her last will and testament in writing or any codicil or codicils thereto to be signed in the presence of and attested by two or more witnesses." She made a will, with the necessary formalities, duly exercising the power and appointing the whole fund to her three daughters. Subsequently, by the first of a series of holographic dispositions written from time to time, and under the last of which her unattested signature appeared, she referred to the fund and gave thereout 500*l.* to each of her sons therein named. One son afterwards died, and then by a later writing of the series she cancelled the gift of 500*l.* to him and gave it to her three daughters. The holograph writings were effective according to Scots law and were, with the will, admitted to confirmation in Scotland, and were also admitted to probate in England along with the will and as a codicil thereto :—

Held—(1.) that the domicil of the testatrix being Scottish, s. 10 of the Wills Act, 1837, which does not extend to Scotland, had no application ; and that, quite independently of the provisions of Lord Kingsdown's Act, the codicil, having been recognized as a valid testamentary instrument by the Probate Division, was capable of operating as an execution of a power of appointment by will over personal estate :

In re Price, [1900] 1 Ch. 442, followed ;

(2.) that, there being no express revocation of the appointment by will, the codicil only revoked the will to the extent to which the appointment in the codicil effectively interfered with the dispositions of the will :

Duguid v. *Fraser*, (1886) 31 Ch. D. 449, followed ; and

(3.) that the Court would aid the defective execution in favour of the two surviving sons, who were consequently entitled to 500*l.* each out of the fund, the rest of which went to the three daughters :

Morse v. *Martin*, (1865) 34 Beav. 500, followed.

Adjourned Summons.

The defendants J. Bruce and T. Kerr, as trustees of the will of Mrs. Walker, the mother of the testatrix Mrs. Hebden, held a

trust fund of 9868*l.* 18*s.* 5*d.* New Consols, representing one-fifth of Mrs. Walker's residuary estate, upon trust for the testatrix for life, and after her death in trust for "all and every or any one or more exclusively of the others" of the children of the testatrix "as she by her last will and testament in writing or any codicil or codicils thereto to be signed in the presence of and attested by two or more witnesses should at any time or times," and whether covert or sole, direct or appoint, and in default of and subject to any such appointment in trust for all the children or the only child of the testatrix, sons at twenty-one and daughters at twenty-one or marriage, if more than one to be divided between them share and share alike subject to the usual provision for bringing appointed shares into hotchpot.

At the date of Mrs. Walker's death Mrs. Hebden's surviving children were Harry Carwardine Hebden, the defendant Frederick William Hebden, the plaintiff Caroline Harriette MacColl, the plaintiff Edith Eleanor Stewart, Alfred Charles Hebden, the defendant Arthur Hebden, and the plaintiff Henrietta Fanny Spence.

By her will dated April 29, 1882, duly signed by her in the presence of and attested by two witnesses, the testatrix directed and appointed that the fund in question should, subject to her life interest therein, belong to and be vested in her three daughters, the plaintiffs, equally among them share and share alike.

Alfred Charles Hebden died on February 26, 1892.

Subsequently to the execution of her will, the testatrix, who resided in Scotland, wrote a series of dispositions, under the last of which her unattested signature appeared. By the first of these holographs, dated May 30, 1892, she provided as follows: "I Caroline Hester Walker or Hebden do divide the sum of 9868*l.* 18*s.* 5*d.* invested in the New Consols left me by my mother amongst my children as follows:—to Harry Carwardine Hebden, Frederick William Hebden and Arthur Hebden 500*l.* each if any of them die before me the interest of the said 500*l.* to go to their widows at the death of the widows the capital to be divided amongst their children should there be no children the capital to go to the widow should Frederick William Hebden die

JOYCE J. 1908 WALKER, *In re.* MACCOLL *v.* BRUCE.

before me the 500*l.* bequeathed to him to be equally divided amongst my three daughters."

By a codicil duly signed and witnessed, dated July 10, 1901, the testatrix appointed the defendant T. Kerr executor and trustee of her will.

Harry Carwardine Hebden died on August 5, 1901.

By another of the series of holographs above mentioned, dated April 3, 1903, the testatrix provided as follows: "Owing to the death of my son Harry Carwardine Hebden also of his wife I cancel the 500*l.* left to him and wish that sum to be divided amongst my three daughters. To my daughter Caroline Harriette MacColl the sum of 2623*l.* To my daughter Edith Eleanor Stewart the sum of 2622*l.* 11*s.* 11*d.* To my daughter Henrietta Fanny Spence the sum of 2622*l.* 6*s.* 6*d.* Should any of my daughters die before their respective husbands the interest of the said sums to be given to them and at their death the capital to be equally divided amongst their children." The testatrix also by the same writing gave 500*l.* to her grandchild Evelyn Frances Hebden, but subsequently the testatrix struck her pen through the gift, and added a marginal note that she cancelled it. The gift as so cancelled appeared in the Scottish confirmation, but both the gift and cancellation were entirely omitted from the English probate.

After the death of the testatrix the holographic dispositions above mentioned, which were effective according to Scots law and had, together with the will and codicil, been admitted to confirmation in Scotland, were, together with the will and codicil of July 10, 1901, admitted to probate in England as a second codicil to her will.

The three daughters took out this summons against the trustees of Mrs. Walker's will, Frederick William Hebden, Arthur Hebden, and the legal personal representatives of Harry Carwardine Hebden and Alfred Charles Hebden, for the determination of the question whether the fund in question was divisible among the plaintiffs by virtue of the appointment contained in Mrs. Hebden's will; or whether they were divisible under her second codicil, and, if so, how or whether the fund was divisible as in default of appointment.

At the hearing it was admitted by all parties that the testatrix was a domiciled Scotswoman.

Hughes, K.C., and *H. J. H. Mackay*, for the plaintiffs. The will is a good exercise of the power, but not so the second codicil. There is no statutory provision which would make the second codicil a good exercise of the power, and Lord Kingsdown's Act does not apply to wills made in exercise of a power. Sect. 10 of the Wills Act also has no application, as the testatrix had her domicil in Scotland. This case is governed by *Barretto* v. *Young* (1), unless a distinction can be found in the suggestion raised in the last paragraph in the judgment in that case, namely, that that was not, and that this is, a case in which the Court could aid the defective execution.

Sheldon, for the defendant trustees.

Vaughan Hawkins, for the defendant Frederick William Hebden. This defendant claims the 500*l*. appointed by the second codicil, and also a proportionate part of the unappointed 500*l*. This is a case of dependent relative revocation. The second codicil is a substituted appointment, and its defective execution will be aided under the general equitable doctrine, and to that extent it takes the place of the appointment in the will. That only involves taking the fund away from some children to make an appointment in favour of those previously unprovided for. The donee of the power is the mother of the objects, and is in the same position for this purpose as the father: Sugden on Powers, 8th ed. pp. 537, 538 This is clearly a case within the rule upon which the Court acts in aiding the defective execution of powers: Farwell on Powers, 2nd ed. p. 335; *Lucena* v. *Lucena* (2); *Cotter* v. *Layer* (3); *Hervey* v. *Hervey* (4); *Chapman* v. *Gibson*. (5) In *Cooper* v. *Martin* (6) the Court, while recognizing the general rule, refused to aid a defective execution on the ground that the prescribed formalities had been made of the essence of the power by the donor.

The testatrix being admittedly domiciled in Scotland, neither Lord Kingsdown's Act nor s. 10 of the Wills Act has any application to the question before the Court.

(1) [1900] 2 Ch. 339.
(2) (1842) 5 Beav. 249.
(3) (1731) 2 P. Wms. 623.
(4) (1739) 1 Atk. 561.
(5) (1791) 3 Bro. C. C. 229.
(6) (1867) L. R. 3 Ch. 47.

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Younger, *K.C.*, and *C. J. Mathew*, for the defendant Arthur Hebden. This defendant claims the 500*l.* given to him by the second codicil, and also a proportionate part of the fund not appointed by the codicil.

The English probate shews that there was a sufficient testamentary intention in the second codicil to supersede altogether the previous appointment. The testatrix being a domiciled Scotswoman, the will and codicil are effectual without reference to Lord Kingsdown's Act at all, and the Wills Act has no application: *In re Price* (1), following *D'Huart* v. *Harkness* (2), and distinguishing *In re Kirwan's Trusts.* (3)

In this case the appointment has to be by a will attested by two or more witnesses. In *Barretto* v. *Young* (4) the defective execution was fatal, because the objects in that case were not persons in whose favour the Court would aid a defective execution, but here the objects are persons in whose behalf the Court will give its aid.

If the Court does not aid the execution, then by s. 4 of Lord Kingsdown's Act we submit that the whole appointment by will is revoked, and the fund goes as in default of appointment.

Norton, *K.C.*, and *Quin*, for the legal personal representatives of Harry Carwardine Hebden and Alfred Charles Hebden. These defendants claim proportionate parts of the unappointed fund. The second codicil disposed of everything except 500*l.*, and if it had been duly signed and attested there would have been no question that it would have been the instrument under which the appointees would have taken, and it would have been an entire revocation of the first appointment by will. The original gift in the will is revoked by the subsequent inconsistent gift in the codicil, and the codicil is effective to revoke the will under s. 4 of Lord Kingsdown's Act. But, although this codicil is a good revocation of the appointment, yet it is not a good execution of the power, because it is not executed with the requisite formalities: *Tupper* v. *Tupper* (5); *Quinn* v. *Butler* (6) (which case shews that revocation is a question of

(1) [1900] 1 Ch. 442.
(2) (1865) 34 Beav. 324.
(3) (1883) 25 Ch. D. 373.
(4) [1900] 2 Ch. 339.
(5) (1855) 1 K. & J. 665.
(6) (1868) L. R. 6 Eq. 225, 228.

intention, and does not depend upon express words); *Barretto* v. *Young*. (1)

We submit that it is quite clear that the testatrix meant the named children to take under the second codicil, because she goes on to give the particular share to each of them in express figures. She was not only revoking the appointment by the will for the purpose of giving effect to this codicil, but she was revoking the earlier appointment entirely. But, although s. 4 of Lord Kingsdown's Act makes the second codicil valid so far as it revokes the will, it does not validate it as an execution of the power, and this is not a case where the Court will aid a defective execution. There has been no case since the Wills Act where an invalid execution of a power by a testamentary document has been aided, because to aid such an execution would be in effect repealing s. 10 of that Act.

In re Price (2) is distinguishable, inasmuch as two witnesses were not necessary to the execution in that case. We submit that there is no good appointment of any fund.

Hughes, K.C., in reply. There is a clear effective appointment by will, and the codicil is entirely ineffective. *Barretto* v. *Young* (1) is a clear and conclusive authority on that point, subject, of course, to any question of aiding the execution.

There is no express revocation of the appointment by will, and I submit that there cannot be a revocation of an effective execution by a document itself defective as an appointment, and that the original valid appointment stands: *Duguid* v. *Fraser*. (3) The doctrine of aiding is not applicable. There is no case where the Court has aided a defective execution for the purpose of destroying a valid appointment. It appears to have been Kay J.'s view in *In re Kirwan's Trusts* (4) that since the Wills Act, 1837, the Court will not aid a defective appointment in a case which falls within s. 10 of that Act. *In re Kirwan's Trusts* (4) was followed in *Hummel* v. *Hummel*. (5) There must be a difference between taking away from those who only take in default of appointment and taking away from those to whom

(1) [1900] 2 Ch. 339.
(2) [1900] 1 Ch. 442.
(3) 31 Ch. D. 449.
(4) 25 Ch. D. 373.
(5) [1898] 1 Ch. 642.

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a valid appointment has been already made. *Morse* v. *Martin* (1) is the only case in which what was validly appointed was taken away from the appointees. In *Lucena* v. *Lucena* (2) the fund went to the same people, and in *Hume* v. *Rundell* (3) it was a claim between persons claiming in default of appointment and persons claiming under a defective appointment. It would be a strange extension of the doctrine to use it to defeat a prior good appointment.

Cur. adv. vult.

Feb. 4. JOYCE J. It was ultimately admitted in the course of the argument in this case that Mrs. Hebden, the testatrix, was domiciled in Scotland, where she resided and executed the codicil the effect of which is in question, and that codicil is perfectly valid according to Scots law, and has been also proved in England.

In these circumstances s. 10 of the Wills Act, which does not extend to Scotland, has no application to the case, and the codicil, having been recognized as a perfectly valid testamentary instrument by the Probate Division, is capable of operating as an execution of a power of appointment by will over personal estate: *In re Price* (4); and there is no necessity to call in aid any of the provisions of Lord Kingsdown's Act.

The codicil, however, was not signed in the presence of or attested by two witnesses, as required by the terms of the power; but the defective execution in this respect can be remedied, according to the established rule in equity, for the persons and in the circumstances for whom and in which it is the practice of Courts of Equity to aid the defective execution of a power.

For the terms and effect of the codicil I can only look at the English probate. There I do not find any express revocation of the appointment duly made by the will, and consequently the codicil does not revoke the disposition by way of appointment made by the will, except to the extent to which the appointment made in the codicil alters or effectively interferes with the dispositions of the will: *Duguid* v. *Fraser*. (5)

(1) 34 Beav. 500.
(2) 5 Beav. 249.
(3) (1822) 6 Madd. 331.
(4) [1900] 1 Ch. 442.
(5) 31 Ch. D. 449.

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The will having appointed to the three daughters the whole fund subject to the power, the testatrix by the unattested codicil gave out of the fund 500*l.* to her son Harry (this, however, being cancelled by a later clause and restored to the daughters), and she also gave similarly 500*l.* to each of her sons Frederick and Arthur, who did not otherwise have any provision made for them out of the fund subject to the power.

In favour of these two last-named sons, therefore, the defective execution of the unattested codicil will be aided by a Court of Equity: *Morse* v. *Martin* (1), which case is as stated in Farwell on Powers, 2nd ed. pp. 341, 342, the marginal note to the report in Beavan's Reports being imperfect, if not inaccurate; and see also *Cotter* v. *Layer*. (2)

Frederick and Arthur, therefore, each take 500*l.*, and the rest goes to the daughters.

Solicitors: *Clayton, Sons & Fargus; Farrer & Co.; Sutton, Ommanney & Rendall.*

R. M.

MANSELL *v.* VALLEY PRINTING COMPANY.

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Jan. 20, 21; *Feb.* 6.

[1906 M. 2340.]

Copyright—Unpublished Picture—Common Law Right—Infringement—Pirated Copy—Innocent Publication—Damages.

Any person who, however innocently, publishes a pirated copy of an unpublished picture, not registered under the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), is liable to damages for infringement of the exclusive owner's common law right of property in the picture.

Millar v. *Taylor*, (1769) 4 Burr. 2303, 2396; *Donaldsons* v. *Becket*, (1774) 4 Burr. 2408; *Prince Albert* v. *Strange*, (1849) 2 De G. & Sm. 652, 695; 1 Mac. & G. 25, 42; *Jefferys* v. *Boosey*, (1854) 4 H. L. C. 815, 867, 979; *Mayall* v. *Higbey*, (1862) 1 H. & C. 148; and *Hollins* v. *Fowler*, (1875) L. R. 7 H. L. 757, 795 (trover), discussed and applied.

WITNESS ACTION.

The plaintiff was an artists' colour and general printer and publisher, and was the exclusive owner of certain pictures and

(1) 34 Beav. 500. (2) 2 P. Wms. 623.

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designs suitable for advertisements, including No. 4, "Girl in summer dress with roses in large hat," and No. 5, "Head and shoulders in large fancy hat." These had been made for the plaintiff by Higham, an artist in his employ, on the terms that they should be the plaintiff's exclusive property. They had cost the plaintiff 18*l.* and 25*l.* respectively. The plaintiff would in due course have made a profit by supplying colour prints to advertisers for use in advertisements, but he had not in fact published or supplied these two pictures; and he did not register them under the Fine Arts Copyright Act, 1862, until the end of July, 1906.

The defendant Rankine, another artist in the plaintiff's employ from November, 1902, to July, 1905, had surreptitiously made copies of the above drawings. After leaving the plaintiff's employ he sold his copies to the defendants, the Valley Printing Company, in a false name as original drawings, and the Valley Printing Company, having no notice whatever of the plaintiff's title, published them before July, 1906, i.e., before registration by the plaintiff.

On complaint made by the plaintiff, the Valley Printing Company at once offered to stop any further publication and to hand over the copies to the plaintiff, but under the circumstances they declined to pay damages.

On August 24, 1906, the plaintiff brought this action for an injunction against Rankine, and for damages and delivery of copies against Rankine, and the Valley Printing Company. Rankine denied the copying, but his defence failed on the evidence, and the only question was whether the innocent publishers, the Valley Printing Company, were liable in damages at common law, there being no statutory copyright until registration. The evidence shewed that the Valley Printing Company's publication of the pictures had rendered them valueless to the plaintiff, so that the 43*l.*, the cost of their production, was lost.

Micklem, K.C., and *George Lawrence*, for the plaintiff. The plaintiff has a common law right of property in these pictures until he chooses to publish them, and he can restrain any

piracy: *Prince Albert* v. *Strange* (1); *Turner* v. *Robinson.* (2) He is also entitled to the remedies for wrongful abstraction of copies "analogous to those of an owner of personalty in the like case," including damages: *Jefferys* v. *Boosey.* (3)

The Valley Printing Company, having in fact infringed the plaintiff's right of property, are liable in damages although innocent: *Hollins* v. *Fowler* (4); *Lee* v. *Simpson.* (5) The publication of the pictures has rendered them valueless to the plaintiff, and he is entitled to recover their cost.

Hon. E. C. Macnaghten, K.C., and *A. B. Shaw*, for the Valley Printing Company. Apart from their undertaking, the Valley Printing Company would have been liable to an injunction against future publication, which would necessarily be wrongful: *Prince Albert* v. *Strange* (1); *Turner* v. *Robinson* (2); but they are not liable in damages for their past innocent publication.

Hollins v. *Fowler* (4) was an action in trover, and the defendants had in fact converted the plaintiff's physical property. Their innocence was of course no defence. If the Valley Printing Company had received and copied Higham's actual drawings, *Hollins* v. *Fowler* (4) would no doubt apply. But they have not seen, copied, or otherwise dealt with a single physical thing belonging to the plaintiff, and it would be impossible to frame a declaration in trover or any other form of case to meet the actual facts.

In *Jefferys* v. *Boosey* (3) Erle J. is dealing with two distinct things, namely, wrongful abstraction and innocent importation. As to the first he says: "Thus, if after composition the author chooses to keep his writings private, he has the remedies for wrongful abstraction of copies analogous to those of an owner of personalty in the like case. He may prevent publication; he may require back the copies wrongfully made; he may sue for damages if any are sustained." Those are clearly remedies against the wrongful abstractor, in this case Rankine. Erle J. then proceeds with the case of an innocent importer, and says, "also, if the wrongful copies were published abroad, and the books were imported for sale without knowledge of the wrong, still the author's right to his composition

(1) 2 De G. & Sm. 652, 695; 1 Mac. & G. 25, 42.
(2) (1860) 10 Ir. Ch. Rep. 121.
(3) 4 H. L. C. 815, 867, 979.
(4) L. R. 7 H. L. 757, 795.
(5) (1847) 3 C. B. 871.

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would be recognized against the importer, and such sale would be stopped." In other words, the innocent importer would be liable to an injunction, which is not disputed, but there is no suggestion that he would be liable to damages or delivery of copies, as in the case of the wrongful abstractor. The same principle should be applied to the innocent publishers in the present case though they are quite willing to deliver up the copies as a matter of concession, not of right.

Lee v. *Simpson* (1) was an action for statutory penalties under the Dramatic Copyright Act, 1833 (3 & 4 Will. 4, c. 15), s. 2, which does not require proof of scienter. It does not touch the present case, which rests on the common law right. Now that common law right, though loosely called property, is not strictly property. It is far more analogous to the so-called property in an unregistered trade mark. In the common law action for infringement an intention to deceive was a necessary ingredient: *Crawshay* v. *Thompson*. (2) In equity an innocent infringer was liable to an injunction, but he was not liable to damages or account of profits before scienter.

In *Edelsten* v. *Edelsten* (3) Lord Westbury L.C. says: "If A. has acquired property in a trade-mark, which is afterwards adopted and used by B. in ignorance of A.'s right, A. is entitled to an injunction; yet he is not entitled to any account of profits or compensation, except in respect of user by B. after he became aware of the prior ownership. At law the proper remedy is by an action on the case for deceit: and proof of fraud on the part of the defendant is of the essence of the action: but this Court will act on the principle of protecting property alone, and it is not necessary for the injunction to prove fraud in the defendant, or that the credit of the plaintiff is injured by the sale of an inferior article. The injury done to the plaintiff in his trade by loss of custom is sufficient to support his title to relief." But that injury gives him no right to damages before scienter, and the same principle ought to be applied to these unregistered pictures.

If the case is one of first impression, the question of relative

(1) 3 C. B. 871.
(2) (1842) 4 Man. & G. 357, 377.
(3) (1863) 1 D. J. & S. 185, 199.

hardship as between the two innocent parties should be considered. If the plaintiff had registered under the Fine Arts Copyright Act, 1862, he would have had statutory copyright from the date of registration, and could have kept the pictures unpublished as long as he pleased, with full statutory protection. The Valley Printing Company, who would then have had the means of discovering his title, would have been deservedly liable to damages for infringement under the statute. But, as the plaintiff neglected this elementary precaution, the Valley Printing Company had no possible means of discovering his title, and under the circumstances it would be fairer that the plaintiff should bear his own loss.

Martelli and *Greaves*, for Rankine.

George Lawrence in reply.

Cur. adv. vult.

Feb. 6. SWINFEN EADY J., after stating the facts and holding that there must be judgment against Rankine for the relief claimed, proceeded:—The Valley Printing Company are innocent parties, and have acted in good faith from beginning to end. They have, however, converted to their own use (although innocently) the property of another. It was insisted on their behalf that, having acted innocently, and not having taken any physical thing belonging to the plaintiff, they were not under any liability for damages; and it was urged that no authority whatever could be produced in support of the proposition that they were under any legal liability for what they had done.

The present case is not one of copyright, which is statutory, and arises upon publication; the plaintiff has an undoubted right of property at common law. As Lord St. Leonards pointed out in *Jefferys* v. *Boosey* (1), nothing can be more distinct than these two things. He said: "The common law does give a man who has composed a work a right to that composition, just as he has a right to any other part of his personal property; but the question of the right of excluding all the world from copying, and of himself claiming the exclusive right of for ever copying his own composition, after he has published it to the world, is a

(1) 4 H. L. C. 979

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totally different thing." Lord Brougham also pointed out (1) that the right of the author before publication was unquestioned. Erle J., in giving his opinion upon the question submitted to the judges, stated what that right was. He said (2): "The nature of the right of an author in his works is analogous to the rights of ownership in other personal property, and is far more extensive than the control of copying after publication in print, which is the limited meaning of copyright in its common acceptation, and which is the right of an author, to which the statute of Anne relates. Thus, if after composition the author chooses to keep his writings private, he has the remedies for wrongful abstraction of copies analogous to those of an owner of personalty in the like case. He may prevent publication; he may require back the copies wrongfully made; he may sue for damages if any are sustained."

Now the remedies "of an owner of personalty in the like case" are clear and well-established. Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion: see *Hollins* v. *Fowler*. (3) So far as regards the common law right of property in unpublished works, no distinction can be drawn between a literary work and an artistic work. "The property," said Lord Cottenham in *Prince Albert* v. *Strange* (4), "of an author or composer of any work, whether of literature, art, or science, in such work unpublished and kept for his private use or pleasure, cannot be disputed, after the many decisions in which that proposition has been affirmed or assumed." And on the preliminary hearing of the same case Knight Bruce V.-C. said (5): "Upon the principle, therefore, of protecting property, it is that the common law, in cases not aided nor prejudiced by statute, shelters the privacy and seclusion of thoughts and sentiments committed to writing, and desired by the author to remain not generally known. . . . . Such then being, as I believe, the nature and foundation of the common

(1) 4 H. L. C. 962.
(2) 4 H. L. C. 867.
(3) L. R. 7 H. L. 757, 795.
(4) 1 Mac. & G. 25, 42.
(5) 2 De G. & Sm. 652, 695.

law as to manuscripts, independently of parliamentary additions and subtractions, its operation cannot of necessity be confined to literary subjects. That would be to limit the rule by the example. Wherever the produce of labour is liable to invasion in an analogous manner, there must, I suppose, be a title to analogous protection or redress."

The right of an author of an unpublished literary production or work of art is not confined to the paper or canvas or other material upon which the work is written or placed. His right is an exclusive right to publish or refrain from publishing it, as he may please, and any one who publishes it without his consent infringes his legal right, and does that which is actionable per se. It matters not how the wrong-doer obtained the production which he publishes, whether he took away the author's original material, or whether he only copied it, or whether some third person copied it and passed the copy on to him.

In *Millar* v. *Taylor* (1) the question determined was as to the existence of any common law right of property, after publication by the author, and after the expiration of the statutory period of copyright under the Act of Parliament 8 Ann. c. 19. The effect of the decision of the Court of King's Bench in that case was afterwards reversed by the House of Lords in *Donaldsons* v. *Becket* (2), which decided that after due publication, and the expiration of the statutory copyright, the author's sole right of printing and publishing is at an end. But in both those cases the nature of the common law right before publication and the remedy for the violation of that right were considered.

In *Millar* v. *Taylor* (3) Lord Mansfield stated that the common law right in unpublished works was "equally detached from the manuscript, or any other physical existence whatsoever"; that the common law right was violated by another person printing without the author's consent; and that the proper remedy was by an action upon the case for damages.

In *Donaldsons* v. *Becket* (2) the question was raised whether an innocent violation of the common law right would give rise to an action for damages. The judges were directed by the

(1) 4 Burr. 2303. (2) 4 Burr. 2408.
(3) 4 Burr. 2396.

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House of Lords to give their opinion upon five questions, of which the first was, "Whether at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale; and might bring an action against any person who printed published and sold the same without his consent?" Of the twelve judges eleven gave a formal opinion, and eight of them, including the Lord Chief Justice of the Common Pleas and the Lord Chief Baron, answered the question so put in the affirmative; two of them (Perrott and Adams BB.) answered the question by saying that at common law an author had the sole right as mentioned, but could not bring an action against any person who printed, published, and sold the same, unless such person obtained the copy by fraud or violence; and one judge (Eyre B.) answered the first question in the negative. The remaining judge was Lord Mansfield, and it appears from 4 Burr. 2417 that Lord Mansfield concurred with the eight judges on the first question. The result, therefore, was that, in the opinion of nine of the twelve judges, an action lay for the infringement of the common law right against a person who infringed, although innocently and without any fraud or violence.

This view was acted upon by the Court of Exchequer in 1862. In *Mayall* v. *Higbey* (1) the defendant was the innocent purchaser of some unpublished photographs belonging to the plaintiff, and which the vendors were not entitled to sell to the defendant. The defendant took fresh negatives of these photographs, and printed from the negatives so obtained. The plaintiff at the trial obtained not only judgment for the return of the photographs or payment of their value, but also 40*s*. damages for the injury done to him by taking the copies, and an injunction restraining the defendant from selling the copies so obtained and from making any more. The Court of Exchequer upheld the judgment, the Lord Chief Baron stating that the 40*s*. damages were in respect of the infringement of the plaintiff's right. Bramwell B. pointed out during the course of the argument that the wrongful act of which the plaintiff complained was a compound one, namely, copying the plaintiff's works and selling the copies.

(1) 1 H. & C. 148.

Thus the defendant, who had innocently invaded the plaintiff's right by making copies of unpublished photographs, and by publishing and selling the copies so made, was held liable to damages for the invasion of the plaintiff's right.

In the present case the plaintiff has, in my opinion, a right to recover against the defendants the Valley Printing Company, although those defendants have not converted anything physical belonging to the plaintiff, and although they have acted innocently. The plaintiff, therefore, recovers judgment against the Valley Printing Company as well as against the defendant Rankine for 43*l.* damages, and there will be an order for delivery up to the plaintiff on oath of all copies and colourable imitations (if any) of his pictures and designs in the defendants' possession.

Solicitors: *Sole, Turner & Knight; James, Mellor & Coleman; Parsons, Evans & Francis.*

G. R. A.

MOORE *v.* ULLCOATS MINING COMPANY, LIMITED. (1)

[1907 M. 1197.]

Landlord and Tenant—Mining Lease—Proviso for Re-entry—Breach of Covenant—Forfeiture—Notice determining Lease—No Re-entry—Issue of Writ containing inconsistent Claims—Unequivocal Demand for Possession.

A lease of iron ore mine granted in 1900 contained covenants by the lessees to work the mine properly, not to do any act which might occasion loss or damage to the mine, to keep correct maps and plans, and to allow inspection by the lessor and his agents of such maps and plans. It also contained a covenant by the lessees to permit the lessor and his agents at all reasonable times to inspect the mine and its workings, and a proviso that on default by the lessees in performing or observing any of the covenants, the lessor might re-enter, and thereupon the lease should be determined. The lessor died in January, 1907. On April 26 his executors' agent was refused inspection of the mine by the lessees. On April 29 the executors gave the lessees notice in writing that they had

(1) This report has been held over in consequence of an appeal which, after being argued on several days towards the end of January, was settled.

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determined the lease, and on May 3 they, through their agents, demanded possession of the mine. On May 4 they issued a writ against the lessees, claiming—(1.) recovery of possession of the mine; (2.) mesne profits; (3.) an injunction to restrain the lessees from working the mine so as to occasion loss or damage to it; (4.) an order on the lessees to allow inspection of the mine and its workings; (5.) a receiver; and (6.) damages:—

Held that, having regard to the form of the proviso for re-entry in the lease, actual re-entry or its equivalent, the issue of a writ claiming possession simpliciter, was necessary in order to determine the lease, and that the notices of April 29 and May 3 were ineffectual for that purpose.

Dicta of Bayley J. in *Fenn v. Smart*, (1810) 12 East, 444, 448, and Parke B. in *Jones* v. *Carter*, (1846) 15 M. & W. 718, 725, followed.

Held, also, that the claim in the writ for possession was inconsistent with the claim for an injunction, and that the writ was not therefore an unequivocal demand for possession so as to operate as a final election by the executors to determine the lease.

Evans v. *Davis*, (1878) 10 Ch. D. 747, followed.

WITNESS ACTION.

By a lease dated December 28, 1900, certain mines, veins, seams, and beds of iron ore lying under freehold lands forming part of the Ullcoats estate, in the parish of St. John Beckermet, in the county of Cumberland, together with the liberties therein mentioned, but subject to the exceptions and reservations therein mentioned, were demised by John Moore to the defendants for the term of twenty-three and a half years from January 1, 1898, subject to the payment of the rents thereby reserved and to the performance of the covenants and provisions therein contained. The lease contained covenants by the defendants—(1.) that they would keep accounts, books, and journals as therein mentioned; (2.) that they would from time to time and at all times during the said term make and keep correct maps and plans of the demised mines and of all workings thereof, and also of all the workings thereafter to be made therein, and of various other things and matters as therein mentioned; (3.) that they would from time to time upon request produce the said several plans, books, or journals for the perusal or inspection of the lessor and his agents or any of them, and permit copies, abstracts, or extracts to be made by them respectively without hindrance; (4.) that they should and would at all times during the said term carry on the working of the demised mines vigorously and

uninterruptedly and in a proper, skilful, and mining-like manner and according to the most approved practice in the winning and working of iron ore mines in the neighbourhood of Whitehaven, and in such manner as to get and raise the greatest quantity of ore which could be reasonably gotten from the same, and if by any unskilfulness or careless management any of the demised mines were rendered incapable of being worked, the ore therein should be paid for by the lessees as if the same had been actually gotten; (5.) that they should not and would not during the continuance of the term thereby granted do, or suffer to be done, any wilful or negligent act, matter, or thing, which might hazard, endanger, or occasion loss or damage to the demised mines or the said lands or any of them or the work therein or thereon respectively; and (6.) that they should and would from time to time and at all reasonable times during the said term permit and suffer the lessor and his stewards, agents, workmen and servants as often as they should think proper to enter upon, go down, and come up from the demised mines and any adjoining mines for the time being owned, occupied, or worked by the defendants and to view the state thereof, and to inspect and examine, dial, measure, and survey the same and the shafts, adits, and workings, buildings and machinery in connection therewith, and, for the purposes aforesaid, to make use of the tackle, ropes, vessels, machinery, implements and utensils of the defendants, and to have the assistance of their workmen and agents. The lease also provided that if and whenever the defendants should make default in performing or observing any of the covenants or agreements therein contained, and on their part to be performed and observed, then and in any such case it should be lawful for the lessor, although he might not have taken advantage of some previous default of a like nature, to re-enter upon any part of the demised mines and premises in the name of the whole; and thereupon the said lease and the liberties, licences, and powers thereinbefore granted, and every clause and thing therein contained, should absolutely determine, without prejudice nevertheless to the recovery of any rent then due and payable and to any right of distress, action, or suit that might have arisen under the said lease prior to such re-entry or to the liability of

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the defendants to perform and observe, and to the right of the lessor to enforce the observance and performance of every or any covenant or stipulation therein contained, and which ought to be performed or observed by the defendants after the expiration of the said term in case the same had then expired by effluxion of time.

Under that lease the defendants entered upon and worked the mines, and were continuing to do so.

The lessor died on January 5, 1907, having by his will and a codicil thereto appointed the plaintiffs executors and trustees thereof.

Early in the same year subsidences in the roof of the workings took place, and water and sand came into the mines. The plaintiffs having heard of this, instructed one Watkyn Thomas and one James Stout to make an inspection of the mines on their behalf. Accordingly on April 1, 1907, Thomas wrote to the defendants as follows: "I am instructed by the executors of the late Mr. Moore to make an inspection of the Ullcoats mines in conjunction with Mr. James Stout, with whom I shall attend at the mine office on Wednesday morning, the 3rd inst., at about noon for that purpose. I shall be glad if you will kindly have the working plan there ready for our inspection, and we shall be glad to have the manager to assist us." The authority on which he purported to act was not immediately produced; but it was subsequently produced. It was dated April 2, 1907, and was in the following terms: "We hereby authorize and appoint Watkyn Thomas, mining engineer, and James Stout, mine manager, to inspect and report on the Ullcoats mines on our behalf."

On April 12, 1907, an inspection was permitted, and Thomas and Stout were allowed to examine the plans and to inspect the mine.

On April 24, 1907, Thomas wrote to the defendants a letter in the following terms: "I beg to give you notice that Mr. John Stout and I shall attend on Friday, the 26th inst., at about 12 noon, to continue our inspection of the plans of the mine, when we shall be glad to have the assistance of the manager." That letter was answered by the defendants on April 25 by a

letter in these terms: "We have yours of the 24th inst., and have to say that we cannot comply with the terms of your notice."

On April 26, 1907, Thomas, alone, presented himself at the mines, and was refused inspection, both of the mines and of the plans.

On April 29, 1907, the plaintiffs gave the defendants the following notice: "We hereby give you notice that the lease"—particulars of which were given—"and the liberties and licences and powers thereby granted have been determined by the company's breach of the covenant to permit inspection by the lessors' agents of the mines demised by the said lease, and to produce to them the company's plans of the said mines, and we hereby also give you notice that we intend to re-enter upon the premises demised by the said lease in pursuance of the proviso for that purpose therein contained."

On May 3, 1907, the plaintiffs' solicitors served upon the defendants this further notice: "We the undersigned, solicitors and agents of Anne Moore and John Sherwen, executors and trustees of the late John Moore, of Ullcoats, Egremont, Cumberland, and on their behalf hereby demand possession of the mines" —describing them—"and we also give you notice that the said John Sherwen will attend at the Ullcoats mines on Saturday, the 4th instant, at 8.0 A.M. to receive from you possession of the said mines."

At the trial it was stated that Sherwen did attend for that purpose and was refused possession, but no evidence was given of the fact.

On May 4, 1907, the plaintiffs issued a writ (1907 M. 1177) against the defendants claiming relief in the following terms: "1. Recovery of possession of certain mines lying in or under Ullcoats estate in the county of Cumberland which were demised to the defendants by an indenture dated the 28th day of December, 1900, and made between the said John Moore of the one part and the defendants of the other part. 2. Mesne profits. 3. An injunction to restrain the defendants their servants and agents from further working the said mines so as to hazard endanger or occasion loss or damage to the said mines or the works therein. 4. An

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order upon the defendants from time to time and at all reasonable times to permit and suffer the plaintiffs, their stewards, agents, workmen and servants as often as they shall think proper to enter upon go down and come up from the said mines and to view the state thereof and to inspect and examine dial measure and survey the same and the pits shafts adits and workings buildings and machinery in connection therewith and for the purposes aforesaid to make use of the tackle ropes vessels machinery implements and utensils of the defendants and to have the assistance of their workmen and agents. 5. A receiver. 6. Damages. 7. Costs."

On May 6, two days afterwards, the plaintiffs discontinued the action, and on the same day, having obtained leave to join other causes of action with their claim to recover possession of the mines, they issued their writ in the present action claiming the same relief.

On May 7 the plaintiffs gave notice of motion for an injunction to restrain the defendants from working the mines so as to endanger them, adopting the words of the covenant in that behalf in the lease. The motion came on on May 10, and stood over for a week. In the interval the plaintiffs gave a supplemental notice of motion for an order for inspection of the plans and workings, which in like manner followed the terms of the covenant in that behalf. On the motions coming on by consent an order was made for inspection, but no order for an injunction was granted.

At the trial a considerable amount of evidence was adduced by both parties on the question whether the defendants had properly worked the mines in accordance with the covenants in the lease, and Warrington J. held that there had been no breach of these covenants, and that the plaintiffs' claim for damages therefore failed. He also held that the refusal by the defendants to allow inspection of the mines on April 26 was a breach of covenant. The only matter calling for a report is on the question whether the lease had been effectually determined by the plaintiffs, and the arguments on the other points are therefore omitted. No injunction was asked for at the bar in respect of the covenants.

Upjohn, K.C., H. Terrell, K.C., and *MacSwinney*, for the plaintiffs. The lease being a mining lease, s. 14 of the Conveyancing and Law of Property Act, 1881, does not apply (sub-s. 6 (ii.)). Assuming, therefore, that there was a breach by the defendants of the covenants in the lease, the plaintiffs have, by the issue of their writ on May 4, determined the lease. It is said that the plaintiffs, by their writ, were asking for inconsistent relief, but that is not so. They claimed possession of the mines, and that was a final election by them to take that form of relief. The claims for an injunction and for inspection were only in the nature of interlocutory relief.

Warmington, K.C., Cave, K.C., and *J. G. Wood*, for the defendants. Even assuming that there has been a breach of the covenants in the lease, the plaintiffs, having regard to the nature of the relief claimed in their writ of May 4, 1907, cannot obtain possession of the mines in this action. The proviso for re-entry in the lease provides that upon breach of any of the covenants the lessor shall re-enter, and that thereupon the lease shall determine. There must therefore be either an actual re-entry or the issue and service of a writ of ejectment. The authorities shew that the issue and service of a writ claiming possession simpliciter is equivalent to actual re-entry, and operates as a final election by the lessor to determine the lease: *Jones* v. *Carter* (1); *Grimwood* v. *Moss* (2); *Ex parte Dyke* (3); *Serjeant* v. *Nash, Field & Co.* (4) But the writ issued on May 4 did not claim possession simpliciter. It also claimed (claims 3 and 4) an injunction, and an order for inspection in the terms of the covenants in the lease, which, it is submitted, were not intended to be in the nature of interlocutory relief, inasmuch as on May 7 the plaintiffs gave notice of motion for an injunction and order in similar terms. The claim for possession, therefore, was inconsistent with the claims under the lease. The plaintiffs were claiming both under and against the lease. Where on the face of the writ, in addition to the claim for possession, there appears a claim which treats the lease as subsisting, the rule that the issue of a writ is equivalent to re-entry does not apply, and

(1) 15 M. & W. 718.
(2) (1872) L. R. 7 C. P. 360.
(3) (1882) 22 Ch. D. 410, 428.
(4) [1903] 2 K. B. 304, 310.

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the issue of the writ in that equivocal form is not an election to determine the lease: Foà's Law of Landlord and Tenant, 4th ed. p. 656; *Evans* v. *Davis* (1); *Bevan* v. *Barnett.* (2) There has therefore been no final election by the plaintiffs to determine the lease. It was open to them at the trial to have abandoned their claim for possession, and to have asked for the injunction and the order for inspection on the footing that the lease was a subsisting lease.

Further, having regard to the form of the proviso for re-entry in the lease, actual re-entry or its equivalent, the issue and service of a writ to recover possession, was necessary in order to determine the lease: *Jones* v. *Carter* (3); *Fenn* v. *Smart.* (4) The notices, therefore, of April 29 and May 3 were inoperative for this purpose. The writ in the present case being equivocal, and not a simple demand for ejectment, was in itself a waiver of the forfeiture.

Upjohn, K.C., in reply. The defendants having committed a breach of the covenant to allow inspection either by their letter of April 25 or their refusal on April 26, the issue and service by the plaintiffs of the writ on May 4 was a final election by them to determine the lease on the ground of forfeiture: *Grimwood* v. *Moss* (5); *Serjeant* v. *Nash, Field & Co.* (6); and nothing done subsequently can affect that final election: *Toleman* v. *Portbury.* (7) It was contended that the writ was not an unequivocal claim for possession. As to that, it is submitted that claims 1, 2 and 5 are obviously claims on the footing that the action is one for the recovery of land. Claims 3 and 4, for an injunction and for an order for inspection, are claims for interlocutory relief. As regards claim 3, the Court has jurisdiction under the Judicature Act, 1873, and Order L., r. 3, to grant an interim injunction in an action of ejectment: *Lowndes* v. *Bettle.* (8) The claim for possession and the claim for the injunction in the writ are not alternative claims: *Read* v. *Wotton.* (9) The word "alternative" is not used, and there is nothing in the

(1) 10 Ch. D. 747.
(2) (1897) 13 Times L. R. 310.
(3) 15 M. & W. 718.
(4) 12 East, 444, 448.
(5) L. R. 7 C. P. 360.
(6) [1903] 2 K. B. 304, 310.
(7) (1871) L. R. 6 Q. B. 245, 249; (1872) L. R. 7 Q. B. 344.
(8) (1864) 34 L. J. (Ch.) 451.
(9) [1893] 2 Ch. 171.

context which suggests that they are intended to be so. If a perpetual injunction were asked for, the Court would refuse to grant it, as it would involve a constant supervision of the working of the mines: *Blackett* v. *Bates* (1); *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co.* (2)

[WARRINGTON J. I do not think that the indorsement of a writ ought to specify interlocutory relief. That relief can be obtained independently.]

Colebourne v. *Colebourne* (3) shews that the writ ought to be so indorsed. The Court has the greatest reluctance to grant injunctions to restrain the working of mines: MacSwinney on Mines and Minerals, 3rd ed. p. 233, citing *Lord Abinger* v. *Ashton* (4); *Wheatley* v. *Westminster Brymbo Coal Co.* (5)

It is submitted, therefore, that claim 3 is an appropriate claim for interlocutory relief. The same observations apply to claim 4. The Court will not put upon the plaintiffs' indorsement of their writ a forced and unnatural meaning merely in order to enable the defendants to defeat the action.

Evans v. *Davis* (6), which was relied upon by the defendants, was really a very different case from the present. The first claim there was for an injunction, and the case was treated by Fry J. as one of estoppel. The plaintiff there by his statement of claim offered to grant a lease in accordance with the agreement, and the Court held that he was estopped from refusing to do so. The case therefore affords no assistance to the Court. *Bevan* v. *Barnett* (7) was also a different case. There the plaintiff by his writ asked for rent which had accrued after the alleged forfeiture had occurred, and it was held that such a claim was a waiver of the forfeiture. That was a point which has been decided over and over again: see *Dendy* v. *Nicholl.* (8)

Assuming that the Court is against us on this point, it is submitted that the plaintiffs were entitled to communicate a final election to determine the lease without actually re-entering or issuing a writ for possession, and that they did in fact do so by

(1) (1865) L. R. 1 Ch. 117.
(2) (1874) L. R. 9 Ch. 331.
(3) (1876) 1 Ch. D. 690.
(4) (1873) L. R. 17 Eq. 358.
(5) (1869) L. R. 9 Eq. 538, 551.
(6) 10 Ch. D. 747.
(7) 13 Times L. R. 310.
(8) (1858) 4 C. B. (N.S.) 376.

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the notices of April 29 and May 3, 1907. The dicta of Parke B. in *Jones* v. *Carter* (1) and of Bayley J. in *Fenn* v. *Smart* (2) can no longer be regarded as law: *Croft* v. *Lumley* (3); *Clough* v. *London and North Western Ry. Co.* (4)

Cave, K.C., was not called upon to reply on the cases.

WARRINGTON J. stated the facts, and held upon the evidence that there had been no breach by the defendants of working covenants in the lease, and that the plaintiffs' claim for damages therefore failed, but held that the refusal by the defendants on April 26 to allow Thomas to inspect the mines and the working plans was a breach of covenant. He continued:—But the question remains, Are the plaintiffs now entitled to recover possession of the mines in consequence of that breach? [His Lordship read the notice of April 29, purporting to determine the lease, and the notice of May 3, demanding possession of the mines, and continued:—] On May 4 the plaintiffs issued a writ in an action which was discontinued two days later. That writ claimed first recovery of the mines, referring to the lease by its date and the parties to it, then mesne profits, then two other heads of relief in claims 3 and 4. [His Lordship read the claims, and continued:—] Those claims followed the exact words of the covenants in the lease which I have just read, and asked for an order in terms according to those covenants.

Now, two questions arise; the first is, Is the writ issued on May 4 a re-entry within the words of the proviso for re-entry or equivalent to a re-entry? I think that it is now settled that under a proviso for re-entry, such as the one in the present case, a writ claiming possession simpliciter, and any further relief which is incidental to a claim for possession, would be equivalent to a re-entry, and if this writ is to be regarded as a writ of that nature, then there has been a sufficient re-entry within the meaning of the covenant, and the lease is terminated. The question I have to determine on this part of the case is this: Is this writ an unequivocal claim for possession, a claim by which both parties are bound? It is argued on behalf of the plaintiffs

(1) 15 M. & W. 725.
(2) 12 East, 448.
(3) (1858) 6 H. L. C. 672, 705.
(4) (1871) L. R. 7 Ex. 26, 35.

that claims 3 and 4 of the writ must be read as claims for interlocutory relief only, and that not only is an opposite construction a wrong construction to put upon them, but it is so impossible a construction that it is quite absurd to suppose that those claims can have any such meaning. I think the real question that I have to consider is whether this writ is in such a form that it would not have been open to the plaintiffs thereafter, if they had considered that their most convenient course, to ask for relief on the footing of the lease being in existence, and to abandon their claim for possession. I think I am bound to come to the conclusion that this writ was equivocal, and that it is a writ to which the plaintiffs, had they been so minded, might have given a meaning contrary to that which they now contend is the only meaning which could be given to it.

Now, it is said that these two claims, one for an injunction and the other for an order for inspection, could only be treated as claims for interlocutory relief. With regard to the claim for an injunction, asking that the defendants might be restrained from further working the mines "so as to hazard or endanger or occasion loss or damage to the said mines or lands, or any of them, or the works therein or thereon," I think that under s. 25 of the Judicature Act of 1873, in an action for ejectment by itself, the plaintiffs could have obtained pending the judgment (followed, of course, by the writ of possession) protection against improper working, by means of an injunction, and an injunction probably in the terms in which this writ is expressed; but I think, further, that if the plaintiffs had been so minded at the trial they might have asked for and might have obtained a perpetual injunction, that is to say, an injunction to continue so long as the lease continued in the same terms.

It has been said and argued with considerable force—and authorities have been cited to support the proposition, which is a perfectly well-recognized one — that the Court will not interfere by means of an injunction to enforce the specific performance of the working of a mine. I quite agree; but it is, I think, equally well settled that, where there is a covenant against any improper working sufficiently definite to be expressed in an order, an injunction may be granted, and I

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see no difficulty in granting an injunction in the terms of this covenant to restrain the defendants from so negligently or wilfully working as to hazard or endanger or occasion loss or damage to the mine. I think, therefore, that the relief might have been obtained if the injunction had been asked for at the trial. But that really is not the question. The question is, Have the plaintiffs by their writ asked for, or stated that they intend to ask for, or may ask for, relief of that nature? I think with regard to claim 3 that they have done so. With regard to claim 4 the case is still stronger, for they have, as I have already pointed out, followed verbatim the words of the covenant, and I cannot conceive any meaning which can be attached to that claim except that they intended at the trial to ask for an order in those terms. Inspection pending the trial is a very different matter. That can be obtained under Order L., r. 3, without asking for it by the indorsement on the writ, and, so far as my experience goes, it is not usual to ask for such an order any more than it is to ask for inspection of documents or any other relief which is incident to the prosecution of every action. It seems to me that claim 4 cannot be construed as an intimation of an intention to ask for an order for interlocutory inspection. It is quite true that the plaintiffs would probably not have obtained such an order at the trial. That I have not to consider. I will accept Mr. Upjohn's argument with regard to that, not having heard Mr. Cave on it. I will accept his argument against himself, but it does not at all follow that the defendants were bound to assume that the plaintiffs would not ask for that which they have said they propose to ask for, although, if they had asked for it, they might have failed to obtain it. It seems to me, therefore, that the writ was not an unequivocal demand for possession. I think the writ was so framed that it might have been possible for the plaintiffs, if they had been so minded, to say, "We will go for the other relief expressed in the writ; we will not go for possession": in other words, I think that the claim for possession and the claim for an injunction and for the order expressed in claim 4 are inconsistent, and therefore the plaintiffs cannot obtain possession in this present action.

It is enough for me to refer to *Evans* v. *Davis* (1), before Fry J. It is quite true that the facts there were different from those in the present case, and that there were some circumstances in that case which rendered it easier for Fry J. to come to the conclusion to which he did than it is for me to come to the same conclusion in this case, but the principle laid down by Fry J. applies as much to this case as it applied to that. That principle is this, that the writ, in order to be equivalent to re-entry under the proviso for re-entry, must be an unequivocal demand for possession and nothing else. That the construction I put upon the writ in the present case is not so absurd as Mr. Upjohn would have me to believe is shewn by the fact that the plaintiffs discontinued that action for the express reason that it might not be said that, with their claim for possession, they had joined other causes of action, and on May 6 they issued another writ with the leave of the Court; and further, when they came to deliver their statement of claim, the order for inspection which was asked for was expressly within the terms of the writ. I do not say that those facts have any effect upon the writ. If the writ was an unequivocal demand for possession, it remained so, whatever the plaintiffs afterwards did. What I do say is that they themselves thought that that was a construction which might be put upon the writ. It is not absurd to say that that was a construction which the defendants might put upon it, and it is not absurd to say that that is a construction which the Court might hold to be a possible one. I think that is so, and I think, therefore, that the writ was not an unequivocal demand for possession.

Then the plaintiffs contend that if the writ was not an unequivocal demand there was a previous expression of their election contained in the two notices of April 29 and May 3, to which I have already referred. I am of opinion upon the authorities—and I refer particularly to *Jones* v. *Carter* (2) and to a dictum of Bayley J.'s in *Fenn* v. *Smart* (3)—that where the condition in the lease is that the landlord may re-enter he must actually re-enter, or he must do that which is in law equivalent to re-entry,

(1) 10 Ch. D. 747. (2) 15 M. & W. 718, 725.
(3) 12 East, 444, 448

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namely, commence an action for the purpose of obtaining possession. Parke B. in *Jones* v. *Carter* (1) puts that quite plainly. In the particular case to which he was referring the proviso for re-entry was in a different form to that in the present case—a form which one sometimes finds, namely, that upon breach the lease shall be determined. What he says is this: "An entry, or ejectment, in which an entry is admitted,"—that is, having reference to the old form of procedure—"would be necessary in the case of a freehold lease, or of a chattel interest, where the terms of the lease provided that it should be avoided by re-entry. Whether any other act unequivocally indicating the intention of the lessor would be sufficient to determine this lease"—that is, the lease in the form of the one with which he was dealing—"which is made *void* at the option of the lessor, we need not determine, because an ejectment was brought, and proceeded with to the consent-rule, by which the defendant admitted an entry, and the entry would certainly be an exercise of the option." In *Fenn* v. *Smart* (2) Bayley J.—although it is only a dictum in the course of the argument, but it shews the view he took—said: "Must not the necessity of an entry depend upon the wording of the condition? If the words be, that upon the doing of such an act, the reversioner may enter, there must be an entry to avoid the estate; but if the estate be granted upon condition that if the grantee do such an act, the estate shall thereupon immediately cease and determine, there no entry is necessary." He there draws a distinction between the two classes of cases. In my opinion the present case falls within the first class, and I do not see how it is possible, on any construction of this proviso for re-entry, to say that the lessors have re-entered, when all that they have done is to give a notice of their intention to re-enter, founded on a statement that the lease had determined, which had not in fact happened, or a demand for possession founded on that notice. I think the only thing here that could be relied upon as equivalent to actual re-entry was the issue of the writ. In my opinion the issue of that writ, for the reasons I have stated, was not unequivocal, and therefore the plaintiffs are not entitled to possession.

(1) 15 M. & W. 718, 725. (2) 12 East, 444, 448.

The result is, in my view, that the action fails altogether, and there must be judgment for the defendants with costs.

[The plaintiffs appealed; but ultimately, after the appeal had been argued for several days, the judgment below was discharged by consent, and the case was settled on terms which were not disclosed to the Court.]

Solicitors: *Harrison & Powell, for Brown, Auld & Brown, Whitehaven; Helder, Roberts, Walton & Giles, for Brockbank, Helder & Ormrod, Whitehaven.*

W. I. C.

In re NEW DE KAAP, LIMITED.

[0084 of 1907.]

Company — Winding-up — Voluntary Liquidator — Removal of — By whom Applications may be made to the Court in a voluntary Winding-up — Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 138, 141—*Companies Act*, 1900 (63 *&* 64 *Vict. c.* 48), *s.* 25.

All applications to the Court in a voluntary winding-up are made under s. 138 of the Companies Act, 1862, and the fact that a creditor is enabled to apply under the section (by s. 25 of the Companies Act, 1900) may give him a locus standi to apply under the latter part of s. 141 of the Act of 1862 for the removal of a liquidator and the appointment of another liquidator in the voluntary winding-up.

But the omission from the latter part of s. 141 of the words "on the application of a contributory" (which occur in the former part of the section with reference to the appointment of a liquidator where there is no liquidator) does not authorize an application by a person who is not the liquidator, or a contributory, or a creditor of the company.

THE New De Kaap, Limited (below called the old company), was incorporated on July 16, 1904, to take over the assets and liabilities of two other companies and to carry on the business of gold mining.

By special resolutions passed and confirmed at meetings of the company held on June 6 and 22, 1906, it was resolved—(1.) that the company should be wound up voluntarily, and that W. Hutton should be appointed liquidator; (2.) authorizing the liquidator to consent to the registration of a new company to be

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called the New De Kaap (1906), Limited; (3.) approving the draft of the agreement mentioned below, and authorizing the liquidator, pursuant to s. 161 of the Companies Act, 1862, to enter into the agreement with the new company when incorporated, and to carry the same into effect. The New De Kaap (1906), Limited (below called the new company), was incorporated on June 26, 1906, with the object of taking over the assets and liabilities of the old company, and by a reconstruction agreement dated June 28, 1906, and made between the old company and Hutton, as its liquidator, of the one part and the new company of the other part, it was agreed that all the assets of the old company should (subject to debentures and other incumbrances) be purchased by the new company, and that as part of the consideration the new company should undertake and pay the debts and liabilities of the old company and keep the old company and its liquidator and contributories indemnified therefrom and from the costs and expenses of the winding-up of the old company, and that as the residue of the consideration every member of the old company should on making a claim as therein mentioned be entitled to six shares of 5*s.* each in the new company, credited with 4*s.* 6*d.* per share as being paid up, for every five shares held by him in the old company.

A number, but not nearly all, of the shares of the new company were allotted in pursuance of the agreement.

On June 4, 1907, an order was made that the new company should be wound up by the Court.

N. M. Ogle, the liquidator of the new company, took out a summons in the winding-up of the old company against Hutton as its liquidator, asking, amongst other things, that Hutton should be ordered to transfer to or cause to be vested in Ogle certain shares of a third company, forming part of the assets of the old company, and that Hutton should be removed from his office of liquidator of the old company, and that Ogle should be appointed liquidator in his place. The summons was adjourned into Court.

H. Terrell, K.C., and *Arthur Sims*, for the applicant.

Jenkins, K.C., and *Vernon*, for Hutton. There is a preliminary

objection to the summons. The applicant is not a creditor of the company, and therefore s. 25 of the Act of 1900, which enables a creditor to make an application under s. 138 of the Act of 1862, does not help him. Moreover, the application is made under s. 141 of the Act of 1862, which only enables a "contributory" to apply—(*a*) for the appointment of a liquidator in a voluntary winding-up where there is no liquidator; or (*b*) for the removal of a liquidator and the appointment of another liquidator in his place. The second part of the section, it is true, does not say on whose application the order is to be made, but the words "on the application of a contributory" in the first part of the section must be read as governing the whole of it.

H. Terrell, K.C., and *Arthur Sims*, for the applicant. It is submitted on the facts that the applicant is a creditor. But if he is not, he is in a position to apply. The exact position of the applicant in relation to the selling company is shewn by *In re City and County Investment Co.* (1) The latter part of s. 141 of the Act of 1862 does not say by whom an application to remove a voluntary liquidator is to be made, and the words "on the application of a contributory" in the former part of the section ought not to be read into the latter part. The applicant, as liquidator of the new company, the purchaser of the assets of the old company, is the person most interested in seeing that the winding-up of the old company is effectually carried out. [They also referred to *In re Bank of South Australia.* (2)]

Jenkins, K.C., was not called on to reply.

NEVILLE J. The only question which I have to decide here is whether the applicant has any locus standi under the Companies Acts, 1862 and 1900. The sections I have to consider are ss. 138 and 141 of the Act of 1862 and s. 25 of the Act of 1900. Sect. 25 of the Act of 1900 provides that "in a voluntary winding-up an application under section 138 of the Companies Act, 1862, may be made by any creditor of the company." I do not think that the applicant can be said to be a creditor within the meaning of that section, and I am therefore remitted to the Act

(1) (1879) 13 Ch. D. 475. (2) [1895] 1 Ch. 578.

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of 1862, and have to consider the question who can apply to the Court for an order under s. 141 of that Act. The first part of that section provides that "if from any cause whatever there is no liquidator acting in the case of a voluntary winding-up, the Court may, on the application of a contributory, appoint a liquidator or liquidators." This is not a case where there is no liquidator, but is a case in which it is sought to appoint a liquidator in the place of an existing liquidator. The second part of the section is as follows: "The Court may also, on due cause shown, remove any liquidator, and appoint another liquidator to act in the matter of a voluntary winding-up." That part of the section does not say who may apply for the removal of a liquidator and the appointment of another in his place, but, having regard to the wording of the former part of the section, there would, if the section stood alone, be a difficulty in saying that the latter part of the section left it open for any person who was not a contributory to apply for the removal of a liquidator.

But s. 138 of the Act of 1862 provides that in a voluntary winding-up "the liquidator or any contributory may apply to the Court . . . . to determine any question arising in the matter of such winding-up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court." So that in a voluntary winding-up all applications to the Court are made under s. 138, and the fact that the operation of the section has been enlarged by s. 25 of the Act of 1900 may enable a creditor to apply for the removal of a liquidator. But the liquidator of the new company, who is the applicant in the present case, is not a creditor of the company whose liquidator he seeks to have removed, and therefore the preliminary objection that he has no locus standi to make the application must prevail, and the summons must be dismissed with costs.

Solicitors for applicant: *H. G. Campion & Co.*
Solicitor for respondent: *J. N. Keshan.*

F. E.

In re WYTHES' SETTLED ESTATES.

EVE J
1908
Jan. 16.

[1907 W. 2164]

Settled Land—Two Settled Estates—Principal Mansion-house on Each—Alteration in Character of One Estate—Development as Building Estate—Mansion-house Converted into School — Less than Twenty-five Acres occupied with Mansion-house — No longer "principal Mansion-house" — Tenant for Life—Restriction on Powers—Cesser—Settled Land Act, 1890 (53 & 54 *Vict. c.* 69), *s.* 10.

Two estates, the Bickley Park estate, in Kent, and the Copt Hall estate, in Essex, each having its own principal mansion-house, were settled by the same settlement upon the same trusts. The tenant for life had definitely adopted Copt Hall as his residence. The Bickley Park estate was a building estate, and its development as such, which had already commenced at the date of the settlement, was subsequently continued until the character of the surrounding neighbourhood had become altered to such an extent as to render a house of the size and pretensions of Bickley Hall quite out of place and very difficult to let. Ultimately, with the sanction of the Court, Bickley Hall and eighteen acres of pleasure grounds and park were let on a twenty-one years' lease to a schoolmaster, 2000*l.* being first expended out of capital moneys in making the hall suitable for the purposes of a school. The remainder of the pleasure grounds and park, which had originally comprised about 103 acres, was cut up and laid out under a building scheme and a considerable portion sold or let on building leases:—

Held that, in the circumstances, Bickley Hall had ceased to be the principal mansion-house on any settled land, and that the hall and the pleasure grounds and park and lands usually occupied therewith were no longer subject to the restrictions imposed by s. 10 of the Settled Land Act, 1890.

ADJOURNED SUMMONS.

By his will, dated September 5, 1882, George Wythes, of Bickley Park, Kent, and Copt Hall, Essex, appointed executors and trustees and devised to them all his real estate, as to his Bickley Park estate upon certain trusts under which his grandson George E. Wythes was the person having the powers of a tenant for life within the meaning of the Settled Land Act, 1882, and upon further trust after the death of such grandson for his child or children as he should by deed or will appoint, and in default of and subject to any such appointment upon trust for his child or children as therein mentioned, and if there were no

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such children, upon the trusts declared concerning the testator's Copt Hall estate in favour of his grandson Ernest J. Wythes (the respondent) and his issue. The testator then devised his Copt Hall estate upon trusts in favour of his grandson Ernest J. Wythes and his issue, corresponding with the trusts of the Bickley Park estate in favour of his grandson George E. Wythes and his issue.

The testator died in 1883. His grandson George E. Wythes died a bachelor in 1887.

In 1893 the respondent Ernest J. Wythes was let into possession of both estates—*In re Wythes, West* v. *Wythes*. (1) He had since married, and the three infant respondents were the children of the marriage.

The Copt Hall estate was an agricultural estate of about 5000 acres, with Copt Hall as its principal mansion-house.

The Bickley Park estate was a building estate, and consisted at the testator's death of the mansion-house, Bickley Hall, with pleasure grounds and park containing about 103 acres, and other land in the vicinity. The testator had already during his lifetime sold certain portions of the estate for building purposes, and its development as a building estate was continued after his death. When the respondent was let into possession in 1893 he removed all the furniture, pictures and plate of interest or value from Bickley Hall and made Copt Hall his residence.

The change in the character of its surroundings consequent upon the development of the estate as a building estate rendered a house of the size and pretensions of Bickley Hall quite out of place, and great difficulty was experienced in obtaining a tenant for it; but ultimately in 1902, with the sanction of the Court, Bickley Hall and eighteen acres of the park were let to the present tenant, a schoolmaster, for a term of twenty-one years, and a sum of 2000*l.* was expended out of capital moneys in effecting alterations to the house and outbuildings to render them suitable for the purposes of a school.

Upon this application the plans shewing the proposed development as a building estate of the park lands other than those comprised in the lease were before the Court.

(1) [1893] 2 Ch. 369.

The remainder of the land which originally formed the park had been since cut up and laid out, and roads driven through it, under building schemes, and various portions had been sold or let on building leases, and a considerable part of that which remained unsold or unlet was now staked out in building plots. It was also proposed to lay out the eighteen acres, let with Bickley Hall, as soon as the existing lease determined, and this proposed scheme involved the possible demolition of Bickley Hall itself.

In these circumstances it was found that the restrictions imposed by virtue of s. 10, sub-s. 2, of the Settled Land Act, 1890 (1), upon sales and leases of the land in question by the tenant for life caused great inconvenience and expense, and consequently the three trustees of the settlement took out this summons for the determination of the question whether, having regard to the altered character of the Bickley Hall estate, the tenant for life was entitled, notwithstanding the provisions of s. 10 of the Act, to exercise his powers of sale and leasing without the consent of the trustees or an order of the Court.

A. Whitaker, for the applicants, the trustees.

P. O. Lawrence, K.C., and *Leverson*, for the respondent, the tenant for life. It is a question of fact whether Bickley Hall is still a principal mansion-house on the settled land. The settled land in this case consists of two estates settled by the same settlement. *Gilbey* v. *Rush* (2) goes to shew that there can be two principal mansion-houses on settled land. Bickley Hall was the principal mansion-house on the Bickley Hall estate,

(1) The Settled Land Act, 1890, provides as follows:—

Sect. 10: "(1.) From and after the passing of this Act section fifteen of the Act of 1882, relating to the sale or leasing of the principal mansion house, shall be and the same is hereby repealed.

"(2.) Notwithstanding anything contained in the Act of 1882, the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court.

"(3.) Where a house is usually occupied as a farm-house, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent, the house is not to be deemed a principal mansion house within the meaning of this section."

(2) [1906] 1 Ch. 11.

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but the question now is whether it is "the principal mansion-house on any settled land" within the meaning of sub-s. 2 of s. 10 of the Act of 1890. We submit that it is not. The idea of occupation by the owner of the estate as and for his residence is associated with the phrase "principal mansion-house," but the tenant for life has long ago ceased to make this house his residence, and it has been converted, with the sanction of the Court, into a business house in which the business of a schoolmaster is being carried on.

In determining a question of this nature the Court must have regard to the state and condition of the house at the time when the question arises. There is no such rule as "once a principal mansion-house, always a principal mansion-house." This house is now a place of business, and we submit that it is a principal mansion-house no longer.

Then, with regard to the "pleasure grounds and park and lands (if any) usually occupied therewith," those words have reference to the time when the question arises. In *Bruce* v. *Marquess of Ailesbury* (1) Lord Halsbury L.C. transposes the order of the words "pleasure grounds and parks and lands," and appears to have thought that "usually occupied therewith" applied equally to park and pleasure grounds as well as lands; but whether they apply equally to all or only to "lands (if any)," as held by Swinfen Eady J. in *Pease* v. *Courtney* (2), the lands in question, other than the eighteen acres comprised in the lease, have in fact ceased to be pleasure grounds and park and lands (if any) usually occupied with a principal mansion-house. They have been fenced off and are being developed and converted into a building estate, and have not for some years been, and will never again be, occupied with Bickley Hall. They are, therefore, not within sub-s. 2 of s. 10.

Very similar considerations enter into the determination of the question whether this is a principal mansion-house within the meaning of sub-s. 3 of s. 10. Literally, it now comes within the terms of that sub-section, because only eighteen acres are now occupied with Bickley Hall under the existing lease, and they have been fenced off from the rest of the park and lands, which

(1) [1892] A. C. 356, 360. (2) [1904] 2 Ch. 503.

have been cut up and laid out for a building estate. We submit, moreover, that, although a house may originally have had more than twenty-five acres of pleasure grounds and park and have been a principal mansion-house within the definition contained in sub-s. 3, yet when once the sale or breaking up of the park has been sanctioned so that its extent has been reduced to less than twenty-five acres, then the house is no longer a principal mansion-house within this sub-section.

There are three trustees, and each of them has to be consulted and satisfied upon the sale or lease of every plot of this land, however small, and that causes a serious practical inconvenience and great expense in developing an estate of this kind. If the restrictions imposed by s. 10 are removed, the trustees will, of course, still get the notices prescribed by the Act of 1882.

Jessel, K.C., and *Kenneth F. Wood*, for the infant respondents. We submit that Bickley Hall is still a principal mansion-house within the meaning of sub-s. 2 of s. 10 of the Act of 1890. It was deemed to be such in 1902, when the sanction of the Court to the existing lease was obtained; and when has it ceased to be a principal mansion-house? The mere fact that it has become surrounded by other houses of a different character, or that the surrounding neighbourhood has become occupied, cannot of itself be sufficient to change its character. It is true that the present tenant uses it as a school, but that does not divest it of its character as a principal mansion-house within the meaning of the Act, and it is quite possible that on the determination of the lease the owner of the settled estates might want to live in it.

So long as the land occupied with the house is twenty-five acres in extent, the house is a principal mansion-house within the section. The mere fact that the present tenant does not want more than eighteen acres cannot be relied on. If the area of the land still remaining unlotted is added to the amount comprised in the lease, there will still be more than twenty-five acres "usually occupied therewith" within the meaning of sub-s. 3, and the house will still have to be deemed a principal mansion-house within the meaning of the section.

A large part of the estate has been sold already without any

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objection being taken to the necessity imposed by the Act of obtaining the trustees' consent. The trustees are not hostile to the tenant for life, and no substantial reasons have been given for the removal of the restrictions which the Legislature thought fit to impose.

EVE J. It appears to me in this case that I must form my judgment upon the footing that the testator has died leaving things as they are to-day, with the land in Essex and this land in Kent settled under one settlement upon the same trusts—that is to say, upon trust for the tenant for life, with remainder to his children as he shall appoint, and in default of appointment to his children equally. But on the land so settled there are two residences, the one Copt Hall and the other this hall at Bickley.

Now in that state of things one would have to ask oneself this: "Are both of these houses the principal mansion-houses on the settled land, or is one of them the principal mansion-house and the other of secondary importance?"

Copt Hall is a purely residential property, situate within some 5000 acres of land, and at present occupied by the tenant for life. Bickley Hall, on the other hand, is situate in a neighbourhood somewhat nearer London, and is on an estate originally containing some 200 acres, of which about 103 acres were formerly pleasure grounds and park land. A very considerable portion of the estate has already been laid out on a building scheme, which ultimately contemplates the incorporation of the remainder, now less than twenty-five acres, as part of the building estate. And further than that, at the particular moment of time which I am considering, Bickley Hall has been converted from a purely residential house into a house adapted for the carrying on of the business or profession of a schoolmaster.

I cannot help thinking that if the testator had died yesterday, and we were determining to-day which of these two houses constituted the principal mansion-house, there would be only one answer to the question. The answer to the question would be that the principal mansion-house is the hall on the Copt Hall estate, and that Bickley Hall, which no doubt has

had a history, is a house the glories of which have departed, and which now exists only so long as it can be turned to profitable use, while the estate immediately surrounding it is in course of development. Seeing that upon the construction which I put upon the Act it is competent for the Court at any time to say whether or not a particular house is the principal mansion-house, I feel myself bound here to come to the conclusion that Bickley Hall no longer answers that description, and that the principal mansion-house on the settled land is Copt Hall. As I have already said, the glories of Bickley Hall have departed, and it is now merely a house on the settled land used, under the sanction of the Court, for the purposes of a business, and no longer possesses the attributes which entitle it to the protection of s. 10 of the Act of 1890.

There will therefore be a declaration that Bickley Hall and the pleasure grounds, park and lands usually occupied therewith are no longer subject to the restrictions imposed by s. 10 of the Settled Land Act, 1890.

Solicitors: *Atkey, Clarke & Atkey.*

R. M.

In re JOSEPH.

PAIN *v.* JOSEPH.

[1907 J. 1138.]

Will — Construction — Legacy — Forfeiture Condition — Codicil — Substituted settled Legacy — Incidents of original Legacy applicable.

A settled legacy substituted by a codicil for an absolute legacy given by the will is subject to all the conditions and incidents of the original legacy, even where the different quality of the original and substituted bequests renders the operation of a defeasance clause applicable to the original legacy more onerous in the case of the substituted legacy.

ADJOURNED SUMMONS.

By his will, dated October 14, 1883, the testator, Moses Joseph, bequeathed to each of his grandchildren Joseph Sidney Merton, Amelia Rosenberg, and Sarah Merton the sum of 1000*l.*, and,

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after making dispositions of his residuary estate, under which each of his eight surviving children took a share for life, with remainder to their respective children and issue as therein mentioned, the testator, at the close of his will, declared that if any child or grandchild, or issue of such grandchild, should marry a person not professing the Jewish faith, such child, grandchild, or other issue should, for the purposes of that his will, be deemed to have died in his lifetime under twenty-one and unmarried. In addition to this declaration there were several other indications in the will that the testator treated marriage in the Jewish faith as an essential condition to the taking of any interest thereunder; and there was a proviso forfeiting the shares of his sons, or of the husbands of his daughters, in the event of bankruptcy or alienation.

By a second codicil to his will, dated April 18, 1886, the testator revoked the legacies of 1000*l.* given to each of his three grandchildren, and in lieu thereof gave a sum of 1500*l.* to be held on trust for each of them for life, with remainder to their respective children and issue as therein mentioned.

The testator died early in the year 1889, and the settled legacy of 1500*l.* bequeathed in trust for his grandchild Sarah Merton and her issue was in due course set aside and invested, and the income thereof paid to the tenant for life down to December 28, 1898. On this last-mentioned date Sarah Merton intermarried with her present husband, George William Hacket Pain, a Christian and a member of the Church of England. There were two children of the marriage, infants, who were defendants. One of the daughters of the testator having died leaving children, who had attained vested interests in her share of the residuary estate, the trustees of the will sought the direction of the Court upon the point, amongst others, whether they ought to retain the shares of these children on the footing that they were still liable to forfeiture under the declaration of forfeiture on marrying out of the Jewish faith. The matter came before Kekewich J., and by an order dated May 17, 1907, he declared that, according to the true construction of the will, the provision contained therein as to marriage with a person not professing the Jewish faith, so far as related to the grandchildren

of the testator, only applied to their interests under the said will so long as the same were reversionary, and that the trustees ought not to retain the shares of the children of the daughter who had then died.

The result of that decision, so far as it affected the question to be determined on the present summons, was that, in the event which happened of Sarah Merton surviving the testator and being still a spinster at the time of his death, his executors would, if the bequest had not been revoked, have had no alternative but to pay over the legacy of 1000*l.* to Sarah Merton. In other words, the forfeiture clause would only have been effective if Sarah Merton had married outside the Jewish faith in the lifetime of the testator. To that extent the legacy of 1000*l.* bequeathed by the will was subject to the provision as to forfeiture. An originating summons was taken out on June 25, 1907, by the plaintiff Sarah Hacket Pain, against the surviving trustee of the testator's will, and her husband and two infant children, asking—(1.) whether the plaintiff, by her marriage or otherwise, had forfeited her life interest in the legacy of 1500*l.* bequeathed by the testator on trust for the plaintiff and her children; (2.) whether her husband and children had any and what interest in such legacy.

P. O. Lawrence, K.C., and *J. Israel*, for the plaintiff. First, the forfeiture clause at the end of the will prohibiting marriage with any person not of the Jewish faith does not apply to the substituted settled legacy. It is not included in terms in the second codicil. The 1500*l.* is given by that codicil to the plaintiff for life, subject to other provisoes relating to forfeiture. The forfeiture clause in the will as to marriage was held by Kekewich J. not to affect the 1000*l.* legacy when the interest had once become vested in possession. Therefore the substituted legacy when vested would also not be liable to forfeiture: *Bonner* v. *Bonner*. (1) Further, the forfeiture clause is limited to "the purposes of this my will," and is inapplicable to the codicil: *Henwood* v. *Overend* (2), where the words "by this my will" were held to be restrictive and exclusive, meaning the

(1) (1807) 13 Ves. 379. (2) (1815) 13 Ves. 383, n.; 1 Mer. 23, 26.

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very instrument which the testator was about to execute. Secondly, the settled legacy is of a different quality and on a different footing from the original absolute legacy. The application of the forfeiture clause as to marriage outside the Jewish faith would operate with greater severity in the case of the substituted settled legacy than in the case of the original legacy. The plaintiff is therefore entitled to the life interest settled upon her, and has not forfeited it by her marriage.

Jessel, K.C., and *J. G. Faweus*, for the trustee of the will and certain beneficiaries. This settled legacy of 1500*l.* comes within the general declaration at the end of the will as to forfeiture or marriage out of the Jewish faith. The will and all the codicils must be read together. All the codicils except the first two purport to confirm the will. The forfeiture clause is in very wide terms, and is clearly intended to cover every case. The well-settled rule is that substituted legacies are subject to the same conditions and incidents as the original legacies: Theobald on Wills, 7th ed. p. 161, where the cases are collected. The effect of a codicil confirming a will is shewn by the cases of *Doe* v. *Walker* (1), *In re Rayer* (2), and *In re Fraser*. (3)

Martelli, for the husband and children of the plaintiff.

P. O. Lawrence, K.C., in reply.

Cur. adv. vult.

Jan. 30. EVE J. (after stating the facts). The first question raised on the summons now before me is whether the plaintiff Sarah Hacket Pain, formerly Sarah Merton, by her marriage forfeited her life estate in the settled legacy of 1500*l.* The settled legacy bequeathed by the second codicil is in terms a substituted legacy. It is given "in lieu of" the legacy of 1000*l.* Being a substituted legacy, it is therefore prima facie subject to the same incidents and conditions as the original legacy. This rule of construction is established by a long line of authorities. In *Crowder* v. *Clowes* (4) the Master of the Rolls treats it as having been determined by Lord Thurlow in *Leacroft* v.

(1) (1844) 12 M. & W. 591, 601.
(2) [1903] 1 Ch. 685.
(3) [1904] 1 Ch. 111, 726.
(4) (1794) 2 Ves. Jun. 449.

Maynard (1) that substituted and added legacies shall be raised out of the same fund and be subject to the same conditions. In *Mann* v. *Fuller* (2) the rule is stated thus by Page Wood V.-C.: "Where the subject of the first gift is given absolutely to the party or is made defeasible, the second gift has been held to be given upon similar terms; for example, if the former gift were absolute and free of legacy duty, the additional gift has been held to have all the same incidents; so, if the former gift is to be lost on a certain event, the additional gift is to be defeated on the same condition."

In *Earl of Shaftesbury* v. *Duke of Marlborough* (3) Sir Lancelot Shadwell expresses the rule in words which were adopted by Lord Selborne, sitting in the Court of Appeal, in *In re Boddington* (4), as follows: "When the thing bequeathed by the codicil is given as a mere substitution for that which is bequeathed by the will, it is to be taken with all its accidents." (5)

The rule, therefore, is well established, and the principle on which it is founded is explained by Page Wood V.-C. in *Johnson* v. *Lord Harrowby* (6), where he says, after remarking upon the general rule that where a legacy is given expressly in addition to, or in substitution for, one previously given, it is subject to the same conditions and incidents as attached to the original legacy: "The ground of this is, that it is assumed, that, where such words as 'in lieu of' or 'in addition to' are used, the will is intended to stand mutatis mutandis, merely adding or substituting another amount."

Applying these cases and the principle which they lay down to the present facts, I must read the will here as though the absolute legacy of 1000*l.* to Sarah Merton were struck out of the will and the settled legacy of 1500*l.* were inserted in its place. So reading it, is it possible for me to hold that the condition of defeasance with which the testator's will concludes is not applicable to the substituted legacy?

During the argument I confess I was impressed with the consideration that the different quality of the original and substituted

(1) (1791) 3 Bro. C. C. 233.
(2) (1854) Kay, 624, 626.
(3) (1835) 7 Sim. 237, 238.
(4) (1884) 25 Ch. D. 685, 690.
(5) *Sic.*
(6) (1859) John. 425, 427.

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bequests rendered the operation of the defeasance clause so much more onerous in the case of the substituted legacy as to amount almost to a different incident or condition, but further reflection, and a further examination of the cases cited in argument, and the others to which I have already referred, have led me to the conclusion that I should be departing from rules laid down for my guidance by numerous authorities were I to hold that the substituted legacy is not subject to forfeiture. Accordingly I answer the first question in the summons in the affirmative, and declare that the plaintiff has, by reason of her marriage, forfeited her life interest in the legacy therein mentioned. [On the second question his Lordship held that the husband and children of the plaintiff took no interest in the legacy.]

Solicitors: *Buxton Ashton & Son; Joseph & Hyam.*

G. M.

WARRINGTON J. 1908 *Feb.* 28.

COX MOORE *v.* PERUVIAN CORPORATION, LIMITED.

[1908 C. 577.]

Company—Debenture—Floating Security—Issue of further Debentures—Specific Charge—Priority—Pari passu—Ordinary Course of Business.

The defendant company was formed in 1890 with very extensive powers and a very large capital. It issued debentures for 3,700,000*l.* out of a total authorized issue of 6,000,000*l.* These debentures were headed "first mortgage debenture," and by them the company purported to create a floating charge on all its property, but this was not to interfere (until default in payment of principal or interest and steps taken to enforce payment) with the dealing with the property by the company. By condition 1 of the debenture it was stated to be "one of an issue of like debentures for the aggregate sum of *l.*—part of the said authorized issue of 6,000,000*l.*—the whole of which debentures of such authorized issue are intended to rank pari passu as a first charge upon all the company's property," and the company reserved the right to issue the balance. By condition 17 a meeting of debenture-holders might "sanction the creation and issue by the company of debentures or any other security ranking as part of or pari passu with the before mentioned 6,000,000*l.* debentures and to such amounts and bearing such rates of interest and generally on such terms and conditions as may be sanctioned or prescribed at any such meeting."

The company proposed to issue further debentures, and two schemes

were suggested—(1.) to create in favour of trustees a fixed and specific charge upon specific assets of the company to secure the new debentures without any floating charge, the total debenture debt not to exceed the 6,000,000*l.*; (2.) to issue further debentures of the authorized 6,000,000*l.*, the company to create a specific charge in favour of trustees to secure these debentures as in the first scheme.

The plaintiff was a holder of debentures of the company, and he now moved for an injunction restraining the company from issuing securities which should constitute a charge on the company's assets ranking in front of or pari passu with the 6,000,000*l.* first mortgage debentures without first obtaining the assent of a meeting of the debenture-holders, as provided by the conditions indorsed on the debentures:—

Held that, if a rule existed that a company which had given a floating charge could not subsequently create a specific charge except in the course of its ordinary business, it applied to companies which were strictly speaking trading companies; that this was not in the ordinary sense a trading company, but that, if it were, the Court would not assume, in the absence of evidence to that effect, that the schemes were otherwise than in the ordinary course of its business; that the provision of the debenture that the security was not to interfere with the company dealing with its property was in general terms; that the 17th condition only referred to floating charges, and did not prevent the creation of specific charges on specific assets; and that there was no reason why the company should not carry out these proposals.

MOTION.

The Peruvian Corporation, Limited, was formed in 1890 for the purpose of acquiring the rights and undertaking the liabilities of the Peruvian bondholders. The objects of the company, as stated in the memorandum of association, were very extensive. They included the acquisition of real or personal property in Peru or elsewhere, dealing in land, produce and property of all kinds, constructing and managing railways, roads and telegraphs, and carrying on the business usually carried on by railway companies, canal companies, telegraph companies, &c., constructing and managing docks and harbours, ships, mines, and beds of nitrates, the management of the State domains, and power to act as agents of the Peruvian or of any other Government. By clause 3 (16.) they might sell, lease, mortgage, or dispose of any property of the company as might be deemed advantageous. By clause 3 (17.) the company had power "to raise or borrow or secure the payment of money in such manner and on such terms as may seem expedient and in particular by the issue of bonds debentures or debenture stock, perpetual or otherwise,

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and charged or not charged upon the whole or any of the property of the company both present and future including its uncalled capital and to exercise any power of mortgaging conferred by any concession acquired by the company." By clause 3 (33.) the company might "distribute any of the shares debentures bonds obligations stocks securities or other property of or held by the company among its members in specie or otherwise." The capital of the company was 16,500,000*l.*

The company had from time to time issued first mortgage debentures in different series marked A, B, and C, and of different values, for 3,700,000*l.* out of a total authorized issue of 6,000,000*l.* These debentures were all in the following form. They were headed:—

"Series . No. . *l.*

"The Peruvian Corporation Limited.

"First Mortgage Debenture.

"Issue of Debentures for *l.*

"Part of a total authorized issue of 6,000,000*l.* in debentures of 50*l.*, 100*l.*, and 500*l.* each bearing interest at the rate of six per cent. per annum payable half-yearly on the 1st day of April and the 1st day of October.

"The Peruvian Corporation Limited hereinafter called the company, will on the 1st day of April 1926 or on such earlier date as the principal money hereby secured shall become payable under the conditions annexed hereto, pay to the original or first holder hereof or other the bearer hereof for the time being if unregistered or if registered under the said conditions to the registered holder hereof on presentation of this debenture, the sum of *l.*, and will in the meantime and until actual payment pay in accordance with the said conditions, interest on the said principal sum or upon so much thereof as for the time being remains unpaid, at the rate of six per cent. per annum, by equal half-yearly payments, on the 1st day of April and the 1st day of October in each year. And it is hereby declared that the conditions annexed hereto shall be deemed for all purposes to be incorporated herewith. And the company subject to the said conditions hereby charges with the payment of all principal money and interest payable under this debenture, all its property,

rights and effects, present or hereafter to be acquired but so that the charge hereby created shall be a floating charge only not interfering (until default has been made in payment of some principal money or interest secured by a debenture and steps have been taken to enforce the charge created by a debenture) with the dealing with and distribution of the said property, rights and effects, or the division of its profits by the company, among its members."

Amongst the conditions indorsed on the debenture were the following:—

1. "This debenture is one of an issue of like debentures for the aggregate sum of *l.*—part of the said authorized issue of 6,000,000*l.*—the whole of which debentures of such authorized issue are intended to rank pari passu as a first charge upon all the company's property rights and effects, present or hereafter to be acquired, the company reserving the power from time to time to issue the balance of the said 6,000,000*l.* upon such terms as to payment, redemption, rate of interest, and otherwise, as may be found expedient."

Meetings of the debenture-holders might be held, and it was provided by condition 17 that—

"A meeting so convened may by a resolution passed by a majority of not less than three-fourths of the votes of the debenture holders present in person and either holding personally or representing (as proxies for registered debenture holders) not less than one-half in value of the debentures for the time being outstanding assent to any modification or alteration in these presents and in particular may, (1.) Waive for any time the provision making the principal payable on winding up: (2.) Give time for payment of interest or consent to the payment of the same at a reduced rate either temporarily or permanently: or (3.) Sanction the creation and issue by the company of debentures or any other security ranking as part of or pari passu with the before mentioned 6,000,000*l.* debentures and to such amounts and bearing such rates of interest and generally on such terms and conditions as may be sanctioned or prescribed at any such meeting."

The company proposed to issue further debentures, and these

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proposals were stated in an affidavit filed on behalf of the company to be as follows:—

5. "The first scheme is to create in favour of trustees a fixed and specific charge upon specific assets of the corporation (as for example rent charges payable to them from Peruvian railway companies guano concessions annuities falling due from the Peruvian Government shares held by the corporation in subsidiary companies and ships and vessels belonging to the corporation). The corporation would then issue debentures carrying the right to the benefit of such specific charge but without any general or floating charge over any of the assets of the corporation. In such case the debentures so issued would not exceed 2,000,000*l.* in amount and the corporation does not intend that the total debenture debt including these 2,000,000*l.* debentures should exceed 6,000,000*l.*"

6. "The alternative scheme is to create and issue further debentures of the authorized issue of 6,000,000*l.* mentioned in the plaintiff's said affidavit such further debentures not to exceed in amount 2,000,000*l.* thus making up with the existing debentures the aggregate amount of 5,700,000*l.* The corporation would then create a specific charge in favour of trustees similar to that which would be created under the first scheme and the benefit of this specific charge would be attached to the 2,000,000*l.* debentures so to be issued."

These schemes had not been submitted to a meeting of the debenture-holders for their sanction.

The plaintiff was a holder of debentures of the company, and he now moved for an interim injunction restraining the company from creating and issuing prior lien bonds or other securities which should constitute a charge on the company's assets and undertaking ranking in front of or pari passu with the 6,000,000*l.* first mortgage debentures without first obtaining the assent of a meeting of the debenture-holders of the said issue for 6,000,000*l.* first mortgage debentures as provided by the conditions indorsed on the debentures.

Cave, K.C., and *Sargant*, for the plaintiff. The company is precluded by the terms of the debenture from issuing without

our consent any debentures which will rank in priority to or pari passu with ours. No doubt a company which has given a floating charge on all its property can afterwards give a specific charge on specific assets, for a floating charge which stopped borrowing would paralyse the business of the company; but it can only do so in the ordinary course of its business and for the purposes of that business: *In re Panama, New Zealand and Australian Royal Mail Co.* (1); *In re Florence Land and Public Works Co.* (2); *In re Hamilton's Windsor Ironworks* (3); *Wheatley* v. *Silkstone and Haigh Moor Coal Co.* (4) The question in all these cases is whether the money is wanted to prevent the stoppage of the business of the company: *Governments Stock and other Securities Investment Co.* v. *Manila Ry. Co.* (5) There is no evidence that these schemes are for the benefit of the company's business. The Court has also to consider the objects of the company under its memorandum of association, and the construction of the debentures, with the conditions indorsed thereon. The power of the company to distribute property does not include power to create specific mortgages in front of the debentures. The company can do anything which is authorized by the memorandum, but it cannot do anything which is inconsistent with the contract with us. It is claiming to do without our consent something which is much more drastic than that which condition 17 empowers it to do with our consent. The second scheme would be contrary to the condition that all the authorized debentures are to rank pari passu.

Upjohn, K.C., and *Clauson*, for the company. We have power to carry out a scheme which involves the creation of a specific charge on a particular part of our property. We do not claim the right to create a further floating charge. Before the doctrine of a floating charge was fully developed the Court used to act upon the power to carry on business. A floating security has now been defined by Lord Macnaghten in *Governments Stock and other Securities Investment Co.* v. *Manila Ry. Co.* (6) as an equitable charge upon the assets for the time being of a going

(1) (1870) L. R. 5 Ch. 318, 322.
(2) (1878) 10 Ch. D. 530, 540.
(3) (1879) 12 Ch. D. 707.
(4) (1885) 29 Ch. D. 715.
(5) [1897] A. C. 81.
(6) [1897] A. C. 86.

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concern. It is a dormant charge, which is not to be enforced till the happening of certain events which have to be ascertained from the document creating it; and in the meantime the company has a licence to deal with the property. Therefore, the question is what is the licence given to the company; and that depends partly on the construction of the debenture and the conditions indorsed on it, and, to a slight extent, on the memorandum. No doubt the licence is limited to the powers of the company under its memorandum. In most cases the licence to the company is limited to its business; but the constitution of this company, which has not any business in the ordinary sense, does not suggest any such limit to the licence. It is not contended that these schemes contemplate anything beyond the powers of the company. This floating charge is not to interfere with the dealing with the assets, and no qualification ought to be read into that provision. We admit that under condition 17 we cannot, without the consent of the debenture-holders, create a floating security ranking pari passu with or in priority to them; but that condition applies only to floating charges, not to specific charges. It must refer to a further charge, because we have power to issue the rest of the 6,000,000*l.* debentures without their consent. A floating charge does not prevent the making of specific charges or specific alienations of property so long as the company is a going concern: *In re Colonial Trusts Corporation.* (1)

[They were stopped by the Court.]

Cave, K.C., in reply.

WARRINGTON J. read the notice of motion and the description of the schemes set out in the above-mentioned paragraphs 5 and 6 of the affidavit filed on behalf of the company, and said that the real meaning of the first scheme was simply to create a specific charge on a specific property and distribute that charge amongst a number of persons; and by the second scheme the company would create a specific charge which would be distributed amongst a certain number of persons, and those persons would be also holders of debentures forming part of the 6,000,000*l.*,

(1) (1879) 15 Ch. D. 465, 472.

and therefore would as holders of those debentures have a floating charge ranking pari passu with the other holders. The question was one of construction of the debenture and nothing more, but the term "floating security" required some interpretation. His Lordship read the debenture and conditions 1 and 17 indorsed thereon, and continued:—

Now the company, as appears by the memorandum of association, is a very important corporation, formed for the purpose of carrying on what may be called, not improperly I think, public undertakings, with a very large capital, 16,500,000*l.*, and very full powers. The memorandum includes very full powers of selling, leasing, mortgaging, or disposing of any property, raising or borrowing money on such terms as may seem expedient, and, in particular, by the issue of debentures or debenture stock, charged or not charged upon the whole or any property of the company, both present and future, including its uncalled capital. Now the term "floating charge," as I have said, is used in this debenture, and the first question is, What is the meaning of that expression "floating charge"? It has been referred to in many cases, and I propose to read first of all what Lord Macnaghten says about it in the case of *Governments Stock and other Securities Investment Co.* v. *Manila Ry. Co.* (1) There what had happened was that the company after default were proposing to create an issue of bonds by which they were to mortgage certain specific assets, and the real question which the House of Lords had to determine was whether certain powers conferred upon the company before default were still exercisable after default; that is to say, whether it was possible to read into the clause giving them that power the words "and no longer." The House of Lords came to the conclusion that that would be an absurd construction of the document — a business document — which they had to construe. In my opinion the real reason of that decision was that, inasmuch as there was no express power after default, the House of Lords must have considered that there was no limitation of the power which the company would have had under the expression "floating security." I think that must be the real meaning of this

(1) [1897] A. C. 81, 86.

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decision, and therefore the definition given by Lord Macnaghten was not a mere dictum. In that way it became necessary to consider what was meant by "floating security," and it was upon that that Lord Macnaghten made the remark to which I propose to refer: "A floating security is an equitable charge on the assets for the time being of a going concern." Those words "for the time being" are important. "It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default."

Now there is a perfectly clear definition of what, in Lord Macnaghten's view, is meant by a "floating charge"—a charge on the assets for the time being in the varying conditions in which they happen to be from time to time. Now it happens fortunately that (Lord Macnaghten not having distinctly stated that he was contemplating the existence of a specific charge when he referred to the condition of the assets from time to time) there are in a judgment of the Master of the Rolls, Sir George Jessel, expressions which shew that the "varying condition" from time to time includes that particular quality which is expressed by their being subject to a specific charge. In his judgment in *In re Colonial Trusts Corporation* (1) the Master of the Rolls defines a floating charge. He begins by saying: "It would be a monstrous thing to hold that the floating security prevented the making of specific charges or specific alienations of property, because it would destroy the very object for which the money was borrowed, namely, the carrying on of the business of the company, and I may refer, as regards this company, to the following clause of the articles: 'To buy, take on lease, or otherwise acquire land, and manage and improve the same, and to erect, improve, or repair, any buildings thereon, and from time to time to settle or dispose of such land and buildings upon such terms and conditions as they think fit.' It is obvious that they could not

(1) 15 Ch. D. 465, 472.

sell the land and make a title to it if there was this charge upon it which prevented there doing anything at all." And further on he says: "The fact is, the only way of making the thing workable is to treat it (as I understand was decided in the case referred to) as what is sometimes called a floating mortgage or charge attaching on the property of the company in preference to its general liabilities, that is, its liabilities to creditors not secured by specific charge, at the moment the business is put an end to, either by the appointment of a receiver in an action instituted by the debenture-holders against the company, or at the commencement of the winding-up where the company is wound up." There the Master of the Rolls distinctly contemplated that a floating charge would be a charge which had priority over general liabilities, but not over liabilities to creditors secured by a specific charge.

Now it is said that the power to create a specific charge in priority to a floating charge only applies where that charge is for the purposes of the business, and in the ordinary course of carrying on the business. Those expressions have always been used with regard to trading companies. This company, so far as I can see by the memorandum, is not in the ordinary sense a trading company, and I certainly have no evidence at all to shew that these particular schemes are otherwise than in the ordinary course of the carrying on of a business such as this company's. I decline to assume without evidence that what they are proposing to do is not in the ordinary course of the business of this company.

So far on the construction of the words "a floating charge"; but it does not rest there, because on this debenture there are the express words "not interfering with the dealing with and distribution of the said property, rights and effects, or the division of its profits by the company among its members." Now there is nothing in those words to limit the power of the company to deal with and distribute its property. If the plaintiff is right, one must find that limit from something else in the document. In that there is no limit at all, and the words are inserted apparently with the view of expressing what is meant in this debenture by the words "floating security." They are entirely unlimited, and I do not think upon the construction of

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the debenture, taken by itself, it is possible to import into it any such limitation as the plaintiff desires.

I must not part with the debenture without referring to a clause which the plaintiff says compels me to give a more limited construction to the debenture itself; and that is the third provision of the 17th condition. I do not think that provision affects the power of the company to create such a specific charge as they are proposing now to create. The condition says that a meeting of debenture-holders may by resolution "sanction the creation and issue by the company of debentures or any other security ranking as part of or pari passu with the before mentioned 6,000,000*l.* debentures." Now I think what that enables the debenture-holders, or rather the company, with the consent of the debenture-holders, to do is to increase the debenture issue, that is to say, create new debentures which shall form part of the debenture issue referred to here as the 6,000,000*l.* or to rank pari passu with it, which comes to the same thing. I do not think it is intended to interfere, and it does not in terms interfere, with the power of the company to create specific charges on specific assets. It seems to me, therefore, that, regarding these schemes as schemes for the creation of specific charges on specific assets, there is nothing there, either in the debenture itself, in the nature of the security, or in the conditions indorsed on the security, which would prevent the company from doing what they proposed to do.

There is only one other matter which I ought to mention, and that is Mr. Cave's argument that with regard to the second of the two alternative schemes it would be in fact a violation of the first condition of the indenture, which provides that the debentures of the authorized issue are to rank pari passu. I think the answer to that is that if the proposed lenders take, in addition to the specific securities, the debentures which it is proposed to give them as part of the 6,000,000*l.* issue, they will not as debenture-holders have any preference or priority over the others. As debenture-holders they will rank pari passu with the others. It will only be by virtue of the specific charge, which is independent of the debentures, that they will have a preference or priority. It seems to me, therefore, that the second scheme is no more

in conflict with the contract made between the corporation and the debenture-holders than would be the first scheme.

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Motion refused.

Solicitors: *Batten, Proffitt & Scott; Smiles & Co.*

H. C. R.

In re WHALEY.

WHALEY *v.* ROEHRICH.

[1907 W. 3120.]

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Feb. 5, 6.

Fixtures—Tapestries—Right of Removal—General Scheme of Decoration—Devise of House—Bequest of Chattels—Question between Devisee and Legatee.

The testator in his lifetime bought a house in which the former owner had fitted and decorated the dining-room as a perfect specimen of an Elizabethan room. As part of this scheme of decoration certain pieces of tapestry had been fixed to the walls by being nailed upon wooden frames which were kept in their place by the mouldings of an oak dado and frieze above it which were fastened to the wall by screws. A picture of Queen Elizabeth, attributed to Zucchero, painted on wood, was similarly fixed in its place over the fireplace by the mouldings of an overmantel which had apparently been constructed for the picture. The picture and tapestries were bought by the testator as part of the house and included in its price. The testator by his will gave his wife all the furniture and chattels in the house, and devised the house to trustees upon trust to permit her to reside there during widowhood, and then upon trusts under which his grandson had become absolutely entitled:—

Held, that the picture and tapestry, having been fixed as part of a general scheme of decoration and not for their better enjoyment as chattels, passed under the devise of the house and not under the gift of chattels.

Leigh v. *Taylor*, [1902] A. C. 157, distinguished.

EDWARD WHALEY, by his will dated January 13, 1879, after appointing trustees, gave all his furniture, plate, wine, carriages and carriage horses, and all other goods, chattels, and effects belonging to him in or about his dwelling-house, gardens, pleasure grounds, and lands constituting his Taplow estate to his wife Elizabeth absolutely. He then devised his said dwelling-house,

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Taplow Lodge aforesaid, with the gardens and pleasure grounds and lands, and all his real estate at Taplow to his trustees upon trust to permit his said wife to occupy and enjoy the same during widowhood, and after her death or second marriage he gave the same to his son Herbert Whaley if he attained twenty-six. The testator died on July 15, 1879. Herbert Whaley attained twenty-six on January 1, 1885. By a settlement dated July 10, 1880, he conveyed his interest in the Taplow estate to trustees upon trusts under which his son, the plaintiff, became entitled to the fee simple, subject to the interest of the testator's widow, upon his attaining twenty-one. That event happened in 1902, and on November 16, 1903, the trustees of the settlement conveyed the legal estate to him.

The testator's widow died on June 2, 1907, without having been married again, and having by her will given all her personal estate to her daughter Mrs. Roehrich absolutely.

This summons was taken out by the plaintiff against Mrs. Roehrich and her husband for the determination of the question whether a portrait of Queen Elizabeth, on wood, and some tapestries attached to the wall of the dining-room in Taplow Lodge passed under the devise of the house or under the gift of chattels to the testator's widow.

It appeared from the evidence that the Taplow Lodge estate had been purchased by the testator in 1877 from a vendor who had recently built or rebuilt the house as a complete specimen of an Elizabethan dwelling-house. In particular the dining-room, which measured twenty-nine feet by twelve feet six inches, had been designed as an Elizabethan apartment. The lower parts of the walls were covered by a dado of oak panelling two feet six inches high; the upper parts of the wall were on three sides covered by panels of tapestry representing the seasons and rural scenes, and by green stamped velvet; the remaining wall was also in its upper part covered by green stamped velvet. The portrait of Queen Elizabeth was in oils, on wood, and was fitted into an overmantel of carved oak which had apparently been constructed for it. The ceiling, doors, and doorways had been treated in one scheme of decoration with the doors and overmantel. In one case a door leading into the hall had been

covered over with a panel of tapestry and the tapestry cut to allow the door to be opened.

The tapestry panels were nailed upon wooden frames which were fixed in their places by fitting behind mouldings of the dado and a frieze above it; the mouldings were fastened by screws from the front. The picture was also held in its place by mouldings. Neither picture nor tapestries were fastened to the freehold in such a way as to make them irremovable without injury to the building.

Sargant, for the plaintiff. The question here is between the devisee of the house and a legatee of chattels. The rule of law is that as between the heir or devisee of real estate and the executor nothing which is attached to the freehold ever goes to the executor. Lord Mansfield's judgment in *Lawton* v. *Salmon* (1) shews that a relaxation of the old rule had been gradually made in favour of the tenant in cases between landlord and tenant, and of the tenant for life in cases between such tenant and the remainderman, but not as between heir and executor: *Fitzherbert* v. *Shaw* (2); *Bain* v. *Brand* (3); *Norton* v. *Dashwood*. (4)

But in this case the tapestry and picture would not have been removable even if the case had been one between tenant for life and remainderman, because they form part of a general scheme of decoration of the room and are put there to give the room a certain character and value, not to be enjoyed for their own sakes as ornament: *D'Eyncourt* v. *Gregory* (5); *Norton* v. *Dashwood*. (4)

In *In re De Falbe* (6), which went to the House of Lords under the name of *Leigh* v. *Taylor* (7), the Lords Justices held that the tapestry in question in that case had been fixed to the walls for the better enjoyment of the tapestry as a chattel. In the House of Lords Lord Halsbury seems to regard the question as one of intention only, but there can be no presumption of intention between a devisee and legatee of the same testator. The testator in this case had not fixed the tapestry

(1) (1781) 1 H. Bl. 259, n.
(2) (1789) 1 H. Bl. 258.
(3) (1876) 1 App. Cas. 762.
(4) [1896] 2 Ch. 497.
(5) (1866) L. R. 3 Eq. 382.
(6) [1901] 1 Ch. 523.
(7) [1902] A. C. 157.

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and picture, but had bought them as part of the house. Having regard to the history of the subject and the state of the authorities, the House of Lords cannot have intended to decide that the question was precisely the same between a devisee and legatee as between a tenant for life or years and the remainderman or reversioner.

Reynolds v. *Ashby & Son* (1), a case between a mortgagor and mortgagee, shews the importance of the relation between the parties.

Jenkins, K.C., and *A. dB. Terrell*, for the defendant. The tapestry in this case is fixed in the usual way, indeed in the only way in which it can be fixed for purposes of decoration. Nothing which is fixed for the purpose of decoration and would do for any other room can become part of the house. The case is governed by *In re De Falbe* (2) as affirmed by the House of Lords under the name of *Leigh* v. *Taylor*. (3) In that case Rigby L.J. treats articles which have been affixed for purposes of ornamentation as one of the regular established exceptions, and Vaughan Williams L.J. says that exception has been established from the earliest times: see *Squier* v. *Mayer* (4) and *Harvey* v. *Harvey*. (5)

D'Eyncourt v. *Gregory* (6) was disapproved in *In re De Falbe* (2), and *Norton* v. *Dashwood* (7) merely followed it. A light attachment to the freehold does not per se throw the burden of proving intention on the person claiming the chattels as personalty. But here the intention of the testator to enjoy them as chattels is perfectly clear.

NEVILLE J. I need not trouble you, Mr. Sargant. I think this case presents problems of very great difficulty, having regard to the position in which one finds the authorities; but it seems to me, in the present case, that it would be unreasonable to hold that the testator here did not intend the particular decorations of the room in question to pass with his devise of

(1) [1904] A. C. 466.
(2) [1901] 1 Ch. 523, 530, 535.
(3) [1902] A. C. 157.
(4) (1701) Freem. Ch. 249.
(5) (1741) 2 Str. 1141.
(6) L. R. 3 Eq. 382.
(7) [1896] 2 Ch. 497.

the house. It seems to me that here it is a question of construction, although, of course, in arriving at the intention of the testator, one must take into consideration what the law with regard to the passing of fixtures is.

It is, I think, to be noted here that although there is a gift of the furniture and chattels in the house, there is no mention of fixtures in the testator's will. I think that I am bound to take into consideration the fact that the testator purchased the house and that that purchase included as part of the house the fixtures in question. The chief difficulty that I feel with regard to the case is whether I ought to treat the case of *Leigh* v. *Taylor* (1), in the House of Lords, as a decision to the effect that a question of this kind has to be decided in the same way, whether it rests between a limited owner and another, or whether it rests between the administrator and the heir of an intestate. Now I do not think it would be right, having regard to the position of the preceding authorities, so to treat *Leigh* v. *Taylor* (1), and I think that it must be held to be a decision upon a question arising between tenant for life and remainderman, treated, as it was by the House of Lords, as a pure question of fact.

Stirling L.J. in *In re De Falbe* (2) points out (and, if I may say so respectfully, I think correctly) what was the origin of the relaxation of the application of the original maxim under which whatever was attached to the freehold passed as part of the freehold, and it is to be noted that, in the passage from Lord Hardwicke's judgment in *Lawton* v. *Lawton* (3) to which he refers, the grounds given are applicable to the case of limited ownership, but are not applicable to the case where the owner of the fee ornaments or decorates the house in which he resides, or acquires in fee a house for residence which is already ornamented and decorated in a particular way.

I think it is clear here that the decoration originally was intended to give the whole room the appearance of an Elizabethan room, that the whole decoration was in unison, and that the ornaments were inserted, primarily, for the purpose of creating

(1) [1902] A. C. 157. (2) [1901] 1 Ch. 538.
(3) (1743) 3 Atk. 13, 14.

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a beautiful room as a whole, and not intended for the mere display and enjoyment of the chattels themselves. I am not entirely unaffected in that consideration by the fact that part of this tapestry was placed over a part of the wall in which there either originally existed, or afterwards was made, a door, and that the tapestry was cut in order to enable the door to be used, which, I must say, I think indicates that the owner was rather treating the tapestry as a decoration of the room than selecting a proper position for the display of his tapestry. In order to see what the testator meant by the will he made, one has to consider this: that an owner in fee, who attaches things even by way of ornament to the freehold, has no reason for desiring that they should continue as chattels rather than become a part of the house, and the position of a tenant for life, or of a tenant for years, is obviously of an entirely different character, because there, the property going in different directions, the tenant for life is making a present to somebody else if he spends money in ornamenting the rooms which he occupies only as tenant for years or for life.

But, with regard to an owner in fee, it is a matter of perfect indifference whether you call the things chattels or whether you call them parts of the house. The ownership is absolute in his case in either event, and at any time during his life he can sever the ornaments and make them once more chattels, and upon his death he can dispose of them as chattels if he pleases, and again sever them from the freehold, so as to enable them to pass to his executor or to his legatee, as the case may be. But, if he has not done so, I cannot see any ground for supposing that when he devises the house he does not intend the house to pass as he bought it, and as he has used it with regard to the fixed ornaments which were used with it. In this particular will, I certainly see no ground for thinking that he had any such intention. He could readily have disposed of the tapestry or of the picture, did he not suppose that it passed under the devise of the house. I think it ought to be borne in mind that to apply the same idea or principle between the devisee and the executor as is applied between the tenant for life and the remainderman, might lead to results which would be very little anticipated by a testator. In all cases where a house was

devised to a devisee without more, every wainscot, every form of ornament or decoration in the house that could be removed without structural injury, could be and would be removed by the executor, with the result that all that the devisee would get would be the bare walls of the residence devised to him. I think, in nine cases out of ten, so to hold would defeat the intentions of the testator.

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I come to the conclusion that, in this case, the devisee of the house is entitled to the pictures and tapestries.

Solicitors: *St. Barbe Sladen & Wing; Horace W. Chatterton.*

J. R. B.

In re NEW LONDON AND SUBURBAN OMNIBUS COMPANY.

APPLEYARD *v.* SAME COMPANY.

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[1907 N. 1277.]

Company—Debentures—Registration—Creation of Charge — Re-issue — Companies Act, 1900 (63 & 64 *Vict. c.* 48), *s.* 14—*Companies Act*, 1907 (7 *Edw.* 7, *c.* 50), *s.* 15.

Three years before January 1, 1901 (when s. 14 of the Companies Act, 1900, came into operation), a company conveyed and assigned all its present and future real and personal property (including uncalled capital) to trustees to secure an issue of debentures, each of which gave to the registered holder thereof a first charge on the freehold and leasehold property of the company and a floating charge on all its other assets. A few days after the execution of the trust deed the debentures were sealed and issued, seven of them (for 100*l.* each) being issued to A. In 1902 the company purchased from A. the seven debentures and took a transfer of them to U. as its nominee. U. at once deposited them and a blank transfer with a bank to secure an overdraft.

In 1905 the seven debentures were delivered up to the company and cancelled, and the company issued one debenture for 700*l.*, but otherwise in the same form, to R. to secure a cash advance. This debenture was never registered under s. 14 of the Companies Act, 1900. In January, 1907, a winding-up order was made against the company, and on August 28 there came into operation s. 15 of the Companies Act, 1907 (which retrospectively validates the security of re-issued debentures under certain circumstances). In a debenture-holders' action commenced on

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the same day, the question arose whether, having regard to the non-registration of the debenture given to R., he had any security under either it or the trust deed :—

Held—(1.) that the winding-up order was not an order pronounced before March 7, 1907, "as between the parties to the proceedings in which . . . . the order was made" within the meaning of s. 15, sub-s. 5, of the Companies Act, 1907; (2.) that there had been a keeping alive and re-issue of the original debentures within the meaning of s. 15, sub-s. 1; and (3.) that as the charge claimed by R. was created on the execution of the trust deed before January 1, 1901, and not when he advanced money to the company, non-registration of the debenture did not affect his security.

In re Spiral Globe, Ld. (No. 2), [1902] 2 Ch. 209, followed.

Quære, whether the re-issued debenture would have required registration if it had been issued in the place of debentures requiring registration under the Act of 1900.

THE New London and Suburban Omnibus Company was incorporated under the Companies Acts, 1862 to 1893, in 1895.

By a trust deed dated January 1, 1898, the company conveyed to three trustees the freehold hereditaments referred to in the second schedule thereto upon the trusts thereinafter declared and sub-demised the leasehold messuages referred to in the third schedule thereto upon the trusts thereinafter declared. Clause 3 of the deed was as follows : "The company as beneficial owner hereby assigns and conveys unto the trustees all and singular the business now or at any time hereafter carried on by them and the goodwill thereof and the book and other debts and all other the property assets and effects both present and future of the company (other than the real and leasehold estates hereinbefore conveyed and demised respectively) including its uncalled capital for the time being (if any) To hold the same unto the trustees their executors administrators and assigns upon the trusts and for the purposes hereinafter declared concerning the same." By clause 4, until the company should make default in payment of interest or principal secured by the debentures secured by the trust deed or the happening of certain other events (one of which was winding up), the trustees were to permit the company to retain possession of the premises conveyed, demised, or assigned, "and to conduct and carry on therein and therewith all or any of the businesses of the company and receive and enjoy the profits arising therefrom." After

such default or the happening of any of the events referred to in clause 4 the trustees were empowered to sell the mortgaged premises, and were directed to apply the net proceeds of sale in payment of the amounts due on the debentures pari passu.

By clause 16 the company covenanted to pay the principal moneys and interest secured by the debentures in accordance with the tenor thereof respectively and to observe and perform the "several conditions endorsed on such debentures as though the same were herein repeated."

Clause 17 was as follows: "The principal moneys and interest intended to be secured by the debentures shall be a first charge on the mortgaged premises as between the several holders thereof (except as herein otherwise provided). The debentures shall rank pari passu without any preference or priority by reason of date of issue or otherwise." The first schedule contained a form of the debenture secured by the trust deed, and this form was headed "Issue of first mortgage debentures for securing a total sum of 10,000*l.* carrying interest at the rate of 5*l.* per centum per annum." In the body of the debenture the company covenanted to pay the principal and interest to the registered holder, and thereby charged "with such payments its undertaking and all its property and assets whatsoever and wheresoever both present and future."

Condition 1 was as follows: "This debenture is one of a series of debentures for securing principal sums not exceeding in the aggregate 10,000*l.* issued or that may be issued by the company. The debentures of the said series are all to rank pari passu without any preference or priority one over another and are intended to be all in the same form, except that they may vary as to amount of principal and date of issue and shall constitute a first charge on the freehold and leasehold property of the company and also a floating charge upon all the other assets and property of the company but so that the company is not to be at liberty to create any mortgage or charge whatsoever in priority to the said debentures."

On January 26, 1898, seven debentures of the series for 100*l.* each were issued to Alfred H. Atkins for cash.

On January 1, 1901, there came into operation the Companies

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Act, 1900, s. 14 of which provides that "every mortgage or charge created by a company after the commencement of this Act and being either (*a*) a mortgage or charge for the purpose of securing any issue of debentures; or (*b*) a mortgage or charge on uncalled capital of the company; or (*c*) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or (*d*) a floating charge on the undertaking or property of the company, shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company" unless registered within twenty-one days.

In August, 1902, on the motion of W. B. Richardson, one of the directors, seconded by E. Underwood, another director, the board resolved that it had power to invest any surplus capital in the purchase of the company's first mortgage debentures if offered at par.

On October 22, 1902, the company purchased Atkins' debentures for 670*l.* and 3*l.* 3*s.* costs and Atkins transferred them to Underwood, who was acting as a nominee of the company.

Underwood deposited the debentures with a bank, the deposit being accompanied with a blank transfer, to secure an overdraft to the company.

In 1905 the company required a new motor omnibus, but had not the money to pay for it, and applied to W. B. Richardson to find the money and offered to procure a transfer of Underwood's debentures to Richardson. Richardson agreed to lend the money at a rebate of 30*l.*, and, on his paying the company 670*l.*, Underwood's debentures were delivered up to the company and cancelled. A minute of a meeting the directors held on March 1, 1905, stated as follows: "The chairman reported that he had found the necessary funds to purchase the debentures now lodged at the bank; it was thereupon agreed to issue a new bond to Mr. W. B. Richardson for the said debentures."

A debenture dated March 1, 1905, in the same form as that of the other debentures, was accordingly sealed and issued to Richardson to secure 700*l.* and interest.

This debenture was never registered. On January 22, 1907,

an order was made that the company should be wound up by the Court.

On August 28, 1907, there came into force s. 15 of the Companies Act, 1907. (1)

(1) 7 Edw. 7, c. 50, s. 15, is as follows:—

"(1.) Where either before or after the passing of this Act a company has redeemed any debentures previously issued, the company, unless the articles of association of the company or the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the company so to do, and not being an obligation enforceable only by the person to whom the redeemed debentures were issued, or his assigns, shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and where a company has purported to exercise such a power the company shall have power, and shall be deemed always to have had power, to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place, and upon such a re-issue the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

"(2.) Where with the object of keeping debentures alive for the purpose of re-issue they have either before or after the passing of this Act been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

"(3.) Where a company has either before or after the passing of this Act deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

"(4.) The re-issue of a debenture or the issue of another debenture in its place under this section, whether made before or after the passing of this Act, shall be treated as the issue of a new debenture for the purposes of stamp duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued: Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp duty and penalty.

"(5.) Nothing in this section shall prejudice—

"(*a*) the operation of any judgment or order of a court of competent jurisdiction pronounced or made before the seventh day of March one thousand nine hundred and seven as between the parties to the proceedings in which

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On the same August 28, 1907, F. J. Appleyard, on behalf of himself and all other holders of first mortgage debentures of the company, commenced an action against the company, the trustees of the trust deed, and the holders of second mortgage debentures of the company for the execution of the trust deed, and judgment in the usual form was afterwards obtained.

On February 26, 1908, Richardson took out a summons against the plaintiff and the other defendants asking for an order that his first mortgage debenture for 700*l.* might be admitted and that he might be retained on the list of debenture-holders. The summons was adjourned into Court.

Jenkins, K.C., and *Ashton Cross*, for the applicant. The trust deed and the original debentures, having been issued before the Companies Act, 1900, came into force, did not require registration. Nor did the debenture given to Richardson in 1905 require registration. If s. 15 of the Companies Act, 1907, had not been passed the company would have had no power to issue that debenture so as to make it rank as a security pari passu with the outstanding original first mortgage debentures: *In re George Routledge & Sons, Ld.* (1); *In re W. Tasker & Sons, Ld.* (2) But s. 15 of the Act of 1907 altered retrospectively the law as laid down in those cases, and validated as securities debentures, forming part of a pari passu series, which had been re-issued. The section points out three modes in which a re-issue may be made—namely, (1.) by re-issuing the same debentures; (2.) by issuing debentures in their place; (3.) by transfer to a nominee of the company, and a transfer from the nominee. The third mode was adopted when Atkins was paid off, and the second mode when the applicant was given his new debenture. Sub-s. 1 says the company has always had power "to keep the debentures

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the judgment was pronounced or the order made, and any appeal from any such judgment or order shall be decided as if this Act had had not been passed; or

"(*b*) any power to issue debentures in the place of any debentures paid off, or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same."

(1) [1904] 2 Ch. 474.

(2) [1905] 2 Ch. 587.

alive for the purposes of re-issue," and, when it has purported to exercise that power, that it has always had power "to re-issue the debentures" in any one of the three ways indicated. The old debentures for 700*l.* have been kept alive, and are still living in the form of Richardson's one debenture for a like amount. Sub-s. 4 shews that the re-issued debenture is only "a new debenture for the purposes of stamp duty."

R. H. R. Reeve, for the plaintiff. The applicant's counsel have omitted to deal with the principal point in the case, namely, whether the new debenture ought or ought not to have been registered under the Act of 1900. The applicant's debenture was issued after that Act came into force, and it contains a floating charge, and is clearly within s. 14 of the Act, and void as a security for want of registration.

Where a company's directors resolved in 1898 to issue debentures, and some taken by one Davis were not issued until July, 1901, Buckley J. held that the resolution did not create a charge, but that the charge was, so far as Davis was concerned, created in 1901, and therefore required registration: *In re S. Abrahams & Sons.* (1) And where the resolution to issue debentures was passed in 1899, and the trust deed to secure them was executed before the Act of 1900 came into operation, and some were not issued until 1902, the Court of Appeal assumed that registration of those debentures was necessary, for it extended the time for registering them: *In re I. C. Johnson & Co.* (2)

A debenture is issued when "money is paid to the company and an instrument under the company's seal is handed to the subscriber": per Buckley J. in *In re Harrogate Estates, Ld.* (3)

Where a company agreed to issue a man debentures and the debentures were sealed but not tendered for registration until it was too late, and the company then, with the consent of the lender, cancelled the debentures and issued to him new ones which were registered in time, Buckley J. held that the cancelled debentures had not been issued: *In re N. Defries & Co.* (4)

The fact that the covering deed was executed before 1901 and contained subsisting trusts will not protect a debenture given

(1) [1902] 1 Ch. 695.
(2) [1902] 2 Ch. 101.
(3) [1903] 1 Ch. 498, 502.
(4) [1904] 1 Ch. 37.

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after that date which is not registered. If new property is conveyed by the company to the trustees upon the trusts of the deed, the conveyance is a charge which requires registration under the Act of 1900: *Cornbrook Brewery Co.* v. *Law Debenture Corporation.* (1) There is no doubt that when the applicant's debenture was issued it was invalid having regard to *In re George Routledge & Sons, Ld.* (2), and *In re W. Tasker & Sons, Ld.* (3) His counsel say that s. 15 of the Act of 1907 made it good. But that section only came into operation on August 28, 1907, and in the meantime an order had been made to wind up the company. That is an "order of a Court of competent jurisdiction pronounced or made before the 7th day of March, 1907," within the meaning of sub-s. 5 of s. 15.

[NEVILLE J. The section only says that nothing in it is to prejudice the operation of the judgment or order "as between the parties to the proceedings in which the judgment was pronounced or the order made." It means that the rights of the parties determined by the judgment or order are not to be affected. The applicant's rights were not determined by the winding-up order.]

Jenkins, K.C., in reply (not called on as to the last point raised by plaintiff's counsel). The first question is whether the Act of 1900 had anything to do with the case, irrespective of s. 15 of the Act of 1907, and, secondly, whether the Act of 1900 applied having regard to that section. The trust deed contained a specific mortgage of freeholds and leaseholds and an equitable assignment of everything the company had, and it is quite immaterial that the debenture purported to give a floating charge. That floating charge may be void; but the security given by trust deed is not. The "creation" of the charge is not when the debenture is issued to the lender. Where in pursuance of a resolution debentures giving a floating charge were sealed in August, 1900, but were kept in the company's possession and not issued until January 1, 1901, Joyce J. held that they did not require registration under the Act of 1900: *In re Spiral Globe, Ld.* (*No.* 2). (4)

The charge by the new debenture may be disregarded, but

(1) [1904] 1 Ch. 103.
(2) [1904] 2 Ch. 474.
(3) [1905] 2 Ch. 587.
(4) [1902] 2 Ch. 209.

the charge by the trust deed, which is to secure the debentures of the series for the time being, still exists and, as it was created before 1901, does not require registration. When the applicant's debenture was issued it was invalid, not for want of registration, but under the law as laid down in *In re W. Tasker & Sons, Ld.* (1) That law having been altered retrospectively, the moneys for which it was given are secured by the trust deed.

R. H. R. Reeve (on the new case cited). *In re Spiral Globe, Ld.* (*No.* 2) (2) is contrary to all the other cases.

Neville J. This case raises a short point, upon the construction of s. 14 of the Companies Act, 1900. The question on which my decision depends is, When was the charge created by the company in respect of the debenture which was issued to Mr. Richardson?

The construction of s. 14 is not free from difficulty, and one has to consider whether, where there is a conveyance by way of mortgage to trustees for the holders of an issue of debentures, the charge is "created" upon the execution of the mortgage; or whether it only comes into existence from time to time as the money is advanced by debenture-holders, and debentures are issued which give the holder the benefit of the trust deed. It seems to me that the decision of Joyce J. in *In re Spiral Globe, Ld.* (*No.* 2) (2) is in point. It was there held that the question as to the necessity for registration depended not upon the time when the money was advanced upon debentures, but upon the time when the debentures were sealed. The sealing of the debentures in that case is analogous to the execution of the trust deed in the present case, because in either case it was the document under which the charge arose; and if Joyce J. was right in saying that the time for registration ran from the sealing of debentures which were sealed but which were not issued, then the time for registration in the present case must necessarily run from the execution of the deed. In other words, the charge ran from the execution of the deed and not from the advance of money by the debenture-holders. If that be so, it is not necessary to consider the effect of s. 15 of the Act of 1907 upon the re-issue of

(1) [1905] 2 Ch. 587. (2) [1902] 2 Ch. 209.

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debentures requiring registration upon their original issue under the provisions of the Act of 1900. The only question in this case under the Act of 1907 is, What meaning is to be attributed to "re-issue"? What was done in the present case was in effect a keeping alive of the debentures which had been paid off by the company and which were intended to be kept alive for the purpose of re-issue.

I think, therefore, that Richardson is entitled to his debentures and to take the benefit of the trust.

Solicitors for applicant: *Lydall & Sons.*
Solicitor for plaintiff: *J. H. Tuppen.*

F. E.

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Jan. 16, 17; *Feb.* 6.

JONES *v.* PRITCHARD.

[1907 J. 236.]

Easement—Party-wall—Damage by Smoke.

Prior to 1886 plaintiff's predecessor in title built C. House on his own land with a wall to the west, in which were flues and fireplaces used only for C. House, and on the west side flues and fireplaces not so used, but which might be used for any adjoining house built on an adjoining and then vacant piece of land belonging to the defendant.

In 1886 the defendant, being about to build a house on his land, agreed in writing with plaintiff's predecessor for the sale to the defendant of the western half of the western wall of C. House, that wall being treated as divided from top to bottom, throughout its whole length, by a vertical plane in the centre thereof (which plane, if it had been a physical division, would have divided half of each of the flues, including those used for C. House, from the other half). The defendant then built on his land a house called G., adjoining C. House, and so connected with it that the fireplaces on the west side and the flues connected with them were used for the purposes of G., as had been intended. The plaintiff purchased C. House in 1900, and subsequently the flue connected with the defendant's dining-room became defective, in the sense that by reason of cracks which developed in the surrounding masonry smoke found its way therefrom through the plaintiff's half of the party-wall into his rooms and occasioned damage. The cracks were caused by a subsidence in the defendant's house, but the cause of the subsidence was undetermined, and there was no evidence of negligence by the defendant in building his house or otherwise, or want of reasonable precaution:—

Held, that the defendant was not liable for the damage.

Where a man grants a divided moiety of an outside wall of his house

with intent to make it a party-wall between that house and a house to be built on his neighbour's adjoining land, the law implies the grant and reservation, in favour of the grantor and grantee respectively, of such easements as may be necessary to carry out the common intention as to the user of the wall, the nature of the easements varying with the particular circumstances of each case.

Subject to such easements, the owner of each half may deal with it in such manner as he pleases, and if he uses it only for the contemplated purposes, and without negligence or want of reasonable care and precaution, he is not liable for any nuisance or inconvenience occasioned by such user.

For some time prior to the year 1886 Chauntrey House, Beaumaris, was owned in fee simple by Edward Owen, and a strip of land adjoining it on the easterly side was owned for a long term of years by Owen Jones Pritchard.

The western wall of Chauntrey House was constructed with fireplaces on the western side of it, and flues connected with such fireplaces, which were respectively useless for the purposes of that house, but capable of being used for the purpose of any house to be erected on the west side of and adjoining it.

Pritchard, being desirous of building a house on the vacant strip adjoining Chauntrey House, and to make use of the fireplaces and flues in the west wall of it for his house, when erected, on August 26, 1886, entered into an agreement with Owen, which, so far as material, and as set out in the statement of claim in the action, was as follows: "Whereas the said Owen Jones Pritchard is about to build a new house adjoining" Chauntrey House "and agrees to pay the said Edward Owen the sum of 10*l.* for the half of all his the said Edward Owen's rights in the said party wall and chimney breasts and further that the said Owen Jones Pritchard shall be at liberty to build above the level of the roof of 'Chauntrey House' the said Owen Jones Pritchard to put any of the old roof interfered with into good and weathertight order. That in the event of Edward Owen wishing to raise his house he is to have the use of Owen Jones Pritchard's party or gable wall, but any roofs interfered with by Edward Owen must be made good and watertight. . . . . The said Edward Owen agrees to accept the sum of 10*l.* for all his rights in the said gable, and hereby conveys half the land and half the gable to the said Owen Jones Pritchard."

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Shortly after the date of the agreement Pritchard erected on the vacant strip of land a house known as "Gwynfa" in such a way as to utilize the fireplaces on his own side of the party-wall, and he afterwards used the fireplaces and the flues connected therewith for the purposes of Gwynfa.

William Thornton Jones purchased Chauntrey House in 1900.

Shortly before the commencement of the present action the flue connected with the dining-room of Gwynfa became defective, in the sense that, by reason of cracks which had developed in the surrounding masonry, smoke found its way through Jones's half of the party-wall into the drawing-room of Chauntrey House, and also at times into the dining-room, doing some damage to the decorations and furniture.

Jones brought the present action against Pritchard, claiming a perpetual injunction to restrain him from causing a nuisance by unwholesome smoke, soot, and other offensive matters and vapours, and from doing anything upon the defendant's premises or so using them as to occasion danger by fire to the plaintiff's house.

The action was tried before Parker J. on January 16 and 17, 1908.

Buckmaster, *K.C.*, and *T. Bateman Napier*, for the plaintiff. The plaintiff is under no obligation to keep this flue in repair. His common law right is not to be annoyed by the defendant's smoke escaping into his house. The defendant can only use his easement in such a way as not to interfere with the plaintiff's enjoyment of his house. It may be that the defendant can enter on the plaintiff's premises for the purpose of repairing the chimney at his own expense, and the plaintiff is willing to allow him to do so. The defendant causes the smoke, and he is bound to keep it on his own premises: *Tenant* v. *Goldwin*. (1) Absence of negligence on the part of the defendant is immaterial, and so is the question of his liability to repair: *Humphries* v. *Cousins*. (2) The man who kindles a fire on his premises is at common law responsible for any damage which results to other people:

(1) (1704) 1 Salk. 360; 2 Ld. Raym. 1089.
(2) (1877) 2 C. P. D. 239.

Tubervil v. *Stamp*. (1) This liability is not taken away by statute when the fire is intentionally lighted: *Filliter* v. *Phippard*. (2) There seems to be no authority directly in point as to the duties and rights of a person who owns an easement like this, but on general principles it is submitted that by a grant of half a wall to be built against by the grantee the grantee impliedly undertakes to keep the wall smoke-proof. The crack in the chimney results from the subsidence of the defendant's house, and, as that is bonded to the plaintiff's house, the defendant is responsible for negligence in the user of his house: *Rylands* v. *Fletcher*. (3) The obligation is to keep one's house in repair so as not to damage neighbours.

Romer, K.C., and *Austen-Cartmell*, for the defendant. In a case like this each adjoining owner has some easement over the part of the wall belonging to the other. If the defendant's half was removed there would remain a groove in the plaintiff's wall, and, although the defendant has the right to send his smoke along the groove, he is not liable to repair it, inasmuch as it is in a part of the plaintiff's wall. Suppose the defendant's easement was that of allowing water to trickle from the roof of his house on to the plaintiff's yard, and by reason of the yard being in a defective state the water escaped thence and flooded his basement, the defendant would not be liable for the damage. The plaintiff must repair the flue if he wishes to keep the smoke out. The smoke is not collected for a special purpose like the water in *Rylands* v. *Fletcher*. (3) It is produced in the ordinary domestic use of the defendant's house, and the defendant is not bound to keep it at his peril, any more than a man is so bound as regards water for domestic use: *Ross* v. *Fedden* (4); *Blake* v. *Land and House Property Corporation* (5); *Nichols* v. *Marsland*. (6) It makes all the difference that the defendant is not using the flue for a purpose for which it was not constructed, as in *Sanders-Clark* v. *Grosvenor Mansions Co*. (7); Garrett on Nuisances, 2nd ed. pp. 129, 130. The action is brought for an alleged

(1) (1697) 1 Salk. 13.
(2) (1847) 11 Q. B. 347.
(3) (1868) L. R. 3 H. L. 330.
(4) (1872) L. R. 7 Q. B. 661.
(5) (1887) 3 Times L. R. 667.
(6) (1876) 2 Ex. D. 1.
(7) [1900] 2 Ch. 373.

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nuisance, and not for negligence. If there has been any negligence it has been in the bonding of the defendant's house to that of the plaintiff. There is no authority to shew any liability at common law to repair, nothing to justify an injunction on the ground of nuisance, and no evidence of negligence.

Buckmaster, *K.C.*, in reply. By the agreement of 1886 the defendant does not get any express easement, but only half the wall divided from top to bottom. The only right he got was to send his smoke towards the sky by a defined channel. The obligation is on him to repair the channel, as it would be to repair a pipe carrying water over the plaintiff's land: Gale on Easements, 7th ed. p. 450; *Lord Egremont* v. *Pulman*. (1) He has no easement to send smoke into his neighbour's house, and cannot say that the obligation to repair is on the plaintiff. He must not use the flue so as to cause a nuisance, and he must keep it in such repair, if he continues to enjoy the use of it, that no damage or annoyance will be caused to the plaintiff: *Taylor* v. *Whitehead*. (2)

Cur. adv. vult.

Feb. 6. PARKER J. The plaintiff and defendant in this case own adjoining houses at Beaumaris, in the county of Anglesea. The plaintiff's house, which is known as Chauntrey House, was built, some time prior to the year 1886, by the plaintiff's predecessor in title. The defendant's house, which is known as Gwynfa, was built by the defendant, but not until after August 26, 1886. Chauntrey House was originally a detached residence, its western wall abutting on the site on which Gwynfa now stands; but the plaintiff's predecessor in title, foreseeing that the owner of this site would some day desire to erect a house thereon, constructed the western wall of Chauntrey House with fireplaces and flues, useless for the purposes of Chauntrey House, but capable of being used for the purposes of any house adjoining Chauntrey House, on the west side, if at any time such house should be erected. The defendant desired to build a house adjoining Chauntrey House, on the west side thereof, and to make use of these fireplaces and flues for the purposes

(1) (1829) Moo. & M. 404. (2) (1781) 2 Doug. 745.

of such house when erected; and accordingly he and Edward Owen, the then owner of Chauntrey House, entered into the agreement of August 26, 1886, referred to in the statement of claim. This agreement is somewhat ambiguous. I need not, however, construe it, for both parties by their counsel have admitted that, according to its true construction, it was an agreement for the sale to the defendant of the western half of the western wall of Chauntrey House, such wall being treated as divided from top to bottom throughout its whole length by a vertical plane in the centre thereof, the intention being that the wall should thereafter be a party-wall, owned, not in undivided but in divided moieties, by the plaintiff's predecessor and the defendant respectively. For the purpose, therefore, of considering the rights of the parties I will treat the agreement as having this meaning, and as having been completed by an actual conveyance to the defendant of the western moiety of the wall in question, with the ground upon which such western moiety is situate. Shortly after the date of the agreement I have mentioned the defendant erected the house known as Gwynfa in such a way as to utilize (as it was intended he should) the fireplaces on his own side of the party-wall, and he has since used such fireplaces and the flues connected therewith for the purposes of Gwynfa, being in fact the purposes for which such fireplaces and flues were originally constructed by the plaintiff's predecessor in title. The plaintiff purchased Chauntrey House in 1900. It appears that the flue connected with the defendant's dining-room has recently become defective in this sense, namely, that by reason of cracks which have developed in the surrounding masonry smoke finds its way therefrom through the plaintiff's half of the party-wall into the plaintiff's drawing-room, and apparently at times also into his dining-room. Such smoke has undoubtedly done damage to the decorations and furniture.

The question I have to determine is whether, under these circumstances, the defendant is liable in respect of nuisance. Now if a man grant a divided moiety of an outside wall of his own house, with the intention of making such wall a party-wall between such house and an adjoining house to be built by the

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grantee, the law will, I think, imply the grant and reservation in favour of the grantor and grantee respectively of such easements as may be necessary to carry out what was the common intention of the parties with regard to the user of the wall, the nature of those easements varying with the particular circumstances of each case. Subject, however, to the easements of which the grant or reservation will be so implied, the grantor and grantee, being respectively absolute owners of their respective divided moieties of the wall, may respectively deal with such moieties in such manner as they please. Thus, if, for example, it is within the contemplation of the parties that the grantee shall support the roof of the house he intends to build upon that moiety of the wall which is comprised in the grant, the other moiety of the wall will be subject to an easement of lateral support for the benefit of the roof when erected; and similarly the grantee's moiety of the wall will pass to him subject to the easement of lateral support for the benefit of the grantor's roof if supported by his half of the wall. If authority is wanted for the above propositions, I think it will be found in *Richards* v. *Rose* (1) and the recent case of *Lyttelton Times Co., Ld.* v. *Warners, Ld.* (2) The latter case seems to shew that if a grantor is doing, on land retained by him, only what it was at the time of the grant in the contemplation of the parties that he should do, and is guilty of no negligence or want of reasonable care or precaution, he cannot be liable for nuisance entailed upon the grantee. And, of course, where the grantee is occasioning a nuisance to the grantor by doing on the land granted what it was at the time of the grant in the contemplation of the parties that he should do, and there is no negligence or want of care or precaution, the case is an a fortiori one.

In the present case it appears that the imaginary plane which divides that part of the wall which was sold to the defendant from the part which was retained by the plaintiff's predecessor in title and is now vested in the plaintiff passes approximately through the centre of all the chimney flues constructed in the wall, including as well the flues connected with the fireplaces in the plaintiff's house as the flues connected with the fireplaces on

(1) (1853) 9 Ex. 218. (2) [1907] A. C. 476.

the defendant's side of the wall. Under these circumstances there must, I think, be implied in favour of the plaintiff and defendant respectively a reservation and grant of such easements as would be necessary to enable the plaintiff to use the flues connected with his own fireplaces, although he had sold part of them to the defendant, and to enable the defendant to use the flues connected with fireplaces on his side of the wall, although part of them had been retained by the plaintiff. Apart from negligence or want of reasonable care and precaution, neither party is, in my judgment, subject to any liability to the other in respect of nuisance or inconvenience caused by an exercise of the rights or easements so impliedly granted or reserved.

There seems to be no authority in which the precise nature of the easements impliedly granted or reserved upon the sale of a divided moiety of such a wall as that which separates Chauntrey House from Gwynfa is considered, but the general principles of the common law relating to easements are, I think, sufficiently defined to afford assistance in dealing with the question now at issue. In the first place, it appears to me that on principle the owner of a servient tenement cannot so deal with it as to render the easement over it incapable of being enjoyed or more difficult of enjoyment by the owner of the dominant tenement. On this principle neither party can in the present case pull down his half of the wall or stop up his half of any flue used for the purpose of his neighbour's house.

In the next place, it appears to me that, apart from any special local custom or express contract, the owner of a servient tenement is not bound to execute any repairs necessary to ensure the enjoyment or convenient enjoyment of the easement by the owner of the dominant tenement. The grantor of a right of way over a bridge is not by common law liable, nor does he impliedly contract, to keep the bridge in repair for the convenience of the grantee. On this principle neither party is in the present case subject to any liability if, by reason of natural decay or other circumstances beyond his control, his half of the wall falls down or otherwise passes into such a condition that the easement thereover becomes impossible or difficult of exercise.

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Once again, the grant of an easement is prima facie also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment. Thus the grantee of an easement for a watercourse through his neighbour's land may, when reasonably necessary, enter his neighbour's land for the purpose of repairing, and may repair, such watercourse. On this principle each party in the present case may do such acts on the property of the other as are reasonably necessary to the continued enjoyment of the easement; for example, each party would be entitled to repair the other's half of the wall in question so far as was reasonably necessary for the enjoyment of any easement impliedly granted or reserved: see *Pomfret* v. *Ricroft.* (1)

Lastly, my attention was called to the case of *Taylor* v. *Whitehead* (2), in which Lord Mansfield said that by the common law of England he that hath the use of a thing ought to repair it. Though, in my opinion, Lord Mansfield was in that case referring only to the fact above mentioned, that by the common law the owner of the servient tenement is not under any liability for not repairing the subject of the easement, yet there is undoubtedly a class of cases in which the nature of the easement is such that the owner of the dominant tenement not only has the right to repair the subject of the easement, but may be liable to the owner of the servient tenement for damages due to any want of repair. Thus, if the easement be to take water in pipes across another man's land and pipes are laid by the owner of the dominant tenement and fall into disrepair, so that water escapes on to the servient tenement, the owner of the dominant tenement will be liable for damage done by such water. Strictly speaking, I do not think that even in this case the dominant owner can be said to be under any duty to repair. I think the true position is that he cannot, under the circumstances mentioned, plead the easement as justifying what would otherwise be a trespass, because the easement is not, in fact, being fairly or properly exercised. I cannot, however, discover any case in which this principle has been applied unless the easement includes the laying on another man's land of some artificial work to be used for the purposes of and belonging to the dominant

(1) (1669) 1 Wms. Saund. (ed. 1871) 557. (2) 2 Doug. 749.

owner. It would, in my opinion, be quite impossible to apply the principle where, for example, the easement consisted in turning water on to another's land at a definite point, such water being carried away by a surface drain belonging to the servient owner, even though, as a matter of fact, such drain served no other purpose.

To determine whether this principle has any application to the present case, I have to consider the precise nature of the easement granted in respect of the plaintiff's moiety of the flues connected with the defendant's fireplaces. I can readily conceive an easement by virtue of which a dominant owner might have the right to carry his smoke away by a pipe overhanging his neighbour's land. In this case, if the pipe at any point developed a hole so that smoke escaped to the injury of the servient owner, it might well be that the dominant owner might be liable for nuisance. He would not be really exercising his easement, for the pipe would no longer be an efficient pipe for the purpose of carrying away the smoke. In my opinion, however, the defendant's easement is in the present case of a different nature. It is, I think, the right to allow smoke from his fireplace to pass into the flue connected therewith, notwithstanding that at any point of its passage up the flue it may pass from the defendant's moiety into the plaintiff's moiety of the flue. If this be so, the principle I am considering can have no application, for, though there be cracks in the plaintiff's moiety of the flue, the defendant is none the less exercising his rights fairly and reasonably in the manner in which he was intended to exercise them when the easement was granted.

It was suggested that, even on this view of the nature of the easement and the law applicable thereto, the defendant was liable because the cracks in the plaintiff's wall were due to a subsidence or settlement of the defendant's house. It is, I think, established that there has been some such subsidence or settlement, and that the cracks in question have been caused thereby. But the cause of the subsidence or settlement is undetermined, and there is no evidence at all that the defendant, either in building his house or in anything which he has since done, has been guilty of any negligence or want of reasonable

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precaution or has acted otherwise than he was justified in acting under the circumstances of the case.

I am of opinion, therefore, that this action fails, and I see no reason to think that the conclusion to which I have come involves any hardship on the plaintiff. The wall in question has eight flues, four connected with fireplaces in the plaintiff's house and four connected with fireplaces in the defendant's house. It is a mere accident that the flue which is defective is connected with a fireplace in the defendant's house, and at any moment a similar defect may develop in one of the plaintiff's flues. If either party as a condition of using his own flue were liable to keep his neighbour's wall in repair, each party would have the right from time to time to enter into his neighbour's house and test the condition of the wall. For want of notice of any disrepair would be no excuse at law for injury arising from disrepair. My decision is, therefore, a convenient one under the circumstances. It throws no greater burden on the plaintiff than it does on the defendant, and by making each party responsible for his own moiety of the wall saves him from the necessary annoyance of periodic inspections by his neighbour.

With regard to the costs, I think they must follow the event.

Solicitors for plaintiff: *Jaques & Co., for J. Glynne Jones, Bangor.*

Solicitors for defendant: *Ullithorne, Currey & Co., for J. Rice Roberts & Laurie, Llangefni, Anglesea.*

F. E.

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PARKER J.

1908

Feb. 3, 4, 5,

[1907 L. 2019.]

Landlord and Tenant—Fixtures—Tenant's Covenant to deliver up demised Premises with Fixtures—Surrender and Creation of New Tenancy.

A lease of houses made in 1851 for a term of seventy years contained a lessee's covenant at the expiration or determination of the term to deliver up the demised premises "with all and singular the fixtures and articles belonging thereto."

In 1907 the lease was vested in A., and the premises were occupied and used as a common lodging-house by W., who held as a weekly tenant from A.

In June, 1907, the lessors served on A. a notice to repair the premises, and A. in writing made an offer to surrender the premises at once and to pay 100*l.* towards the repairs, and this offer was accepted by the lessors. W., who had affixed to the premises things alleged to be tenant's or trade fixtures, was aware of what was going on, but the lessors did not know of his sub-tenancy until July 1, 1907. The lessors and A. wished to get rid of the sub-tenancy, and W. knew that this was their intention, and early in August A. gave, and W. accepted, a notice to quit on August 19.

By an agreement in writing dated August 7 between the lessors and W., the latter became the weekly tenant of the lessors as from August 12, but no agreement was entered into with reference to W.'s fixtures.

By a surrender by deed executed on August 9 (but dated August 6 so as to make it precede the agreement with W.) A., as beneficial owner, surrendered and assigned the demised premises to the lessors, "to the intent that the residue . . . . unexpired of the term of years" therein might merge and be extinguished in the freehold and inheritance.

On September 12, 1907, the lessors served W. with a notice to quit on September 23:—

Held—(1.) that the lessee's covenant to deliver was binding on W. and was not confined to landlord's fixtures, but extended to tenant's and trade fixtures; (2.) that an agreement to surrender precluded the lessee from removing fixtures then upon the demised premises, although they were tenant's or trade fixtures, but would not affect his sub-tenant's right of removal without the consent of the latter, although the exercise of that right might make the lessee unable to complete his contract with the lessor; (3.) that a contract to surrender a lease was a contract to surrender in possession free from sub-tenancies; (4.) that if W. consented to the surrender, his tenancy was thereby surrendered and his right to remove fixtures was gone; (5.) that if W. did not consent to the surrender, he was between August 9 and 12 the tenant of

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the lessors under the sub-tenancy granted by A., and even a rightful removal during this period by W. would have been a breach of the covenants for title implied by A.'s surrender; but (6.) that by accepting the tenancy commencing on August 12 W. surrendered such tenancy as he already had, and with it any right to remove fixtures.

Semble, that if a tenant, on surrendering his lease in order that a new lease be granted, makes no stipulation to the contrary, he loses his right to remove fixtures, inasmuch as the surrender prima facie includes fixtures, and the subject of the new lease is prima facie what is surrendered in order to be re-demised; although in exceptional cases a termor remaining in possession after the expiration of his term under circumstances shewing that there is merely a prolongation of the term is allowed to remove fixtures after the term is ended.

By an indenture of lease dated November 28, 1851, a strip of vacant ground running back from the Whitechapel Road, London, E.C., to the boundary of No. 16, Vine Court and a messuage known as No. 16, Vine Court were demised to William Miller for a term of seventy years from Christmas at two several yearly rents. Miller covenanted by the lease to lay out 200*l.* at the least in building and completing, fit for habitation, a substantial messuage on the vacant ground to the satisfaction of the surveyor appointed under the Metropolitan Building Act, and also to repair all existing and future buildings on the demised premises, and also at the expiration or determination of the term peaceably and quietly to deliver up in repair as well No. 16, Vine Court as the other premises, "with all and singular the fixtures and articles belonging thereto."

The lessee erected on the vacant ground a messuage known as No. 102, Whitechapel Road.

In 1890 both houses became vested in Morris Abrahams for the unexpired residue of the term, and at this time the reversion in fee was vested in Henry Pige-Leschallas. He died in 1903, having by his will devised all his English real estate to the plaintiffs in the present action.

In the spring of 1907 the demised premises were in a state of very considerable disrepair, and on April 8, 1907, the plaintiffs served a notice of dilapidations on Morris Abrahams. Thereupon Abrahams, accompanied by his son-in-law Jonas Woolf, had an interview with Mr. Eason, the plaintiffs' surveyor, and an arrangement was made for Woolf to inspect the property with

Eason, the object being to induce the latter, if possible, to relax some of the plaintiffs' requirements with regard to the repairs required to be done. Accordingly on May 15, 1907, Eason and Woolf visited the premises and went through the schedule of dilapidations together, going from room to room. The schedule contained many items of repair relating to what were at the trial said to have been tenant's or trade fixtures, but it did not appear in evidence that Woolf objected to any item on this ground, and Eason was not at the time aware that Woolf was the tenant (although he was then holding the premises as a weekly tenant from Abrahams). Nothing came of the inspection of the property, and on June 11, 1907, there was a letter from Abrahams to the firm of which Eason, the surveyor, was a member containing this passage: "With reference to the notice to repair which you served on behalf of the landlord in respect of these premises, I am prepared to surrender these premises to the landlord at once in their present condition if the landlord is willing to accept a surrender. I may mention that there is about fifteen years still unexpired. The ground rent is 32*l.* a year, and the improved rental which would be obtained would be considerable, but, as my present condition of health is not very good, I shall be prepared to make this loss sooner than be troubled further with the property."

On June 12, 1907, Eason replied by letter as follows: "We are in receipt of your letter of the 11th inst. What are we to understand by this? Do you intend to put the premises into repair in accordance with the covenants of your lease and then surrender the premises?"

On June 13, 1907, Abrahams wrote to Eason as follows: "In reply to your letter of to-day, kindly refer to my first paragraph of my last letter, viz.: 'I am willing to surrender the premises in their present condition if the landlord is willing to accept a surrender of same.'"

The answer to that letter was dated June 21, 1907, and was as follows: "With regard to your letters of the 11th and 13th inst. with reference to the above, without prejudice to the notice and schedule which has been served and to our client's legal rights, if you will offer to surrender the lease at once, contribute

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100*l.* towards the repairs, and pay the costs, we will take our client's instructions upon the matter."

Then on June 24, 1907, Abrahams wrote: "In answer to your letter of the 21st inst. I shall be willing to surrender the lease of these premises at once and pay 100*l.* towards the repairs necessary, and will also pay the reasonable costs in the matter."

The plaintiffs accepted this offer, and Eason had Abrahams' letter of June 24, 1907, stamped as an agreement, and the matter then passed into the hands of the solicitors for the plaintiffs and Abrahams respectively. There was no evidence that the acceptance was communicated in writing to Abrahams, but the learned judge found as a fact that it was communicated to him, inasmuch as the subsequent correspondence related to the agreement constituted by the acceptance being carried out, and the agreement was ultimately carried out, Abrahams accounting for the rents of the property as from June 24, 1907, the date of the agreement, which he was under no obligation to do if the matter still remained in negotiation. The solicitors first directed their attention to ascertaining whether there were any tenancies and sub-tenancies and how the same were to be dealt with.

On July 1, 1907, the plaintiffs' solicitors were informed for the first time that Woolf was a weekly tenant of the whole property at 2*l.* a week, paying the rates and taxes, and on July 31, 1907, they obtained for the first time particulars of the sub-tenancies created by Woolf. The plaintiffs desired to obtain information as to the rack rentals, and were willing to take over the sub-tenancies; but all parties recognized that Woolf's tenancy was to be got rid of, and the learned judge found that Woolf himself was fully aware of what was intended to be done in this respect.

Shortly afterwards Abrahams and Woolf had an interview, and the former gave the latter, and the latter accepted, a notice determining the weekly tenancy of the latter on August 19, 1907, being the first date on which it could be determined.

Woolf in his evidence said that he accepted this notice in order to enable his father-in-law to complete the surrender, but his solicitor appeared to have been anxious that Woolf should continue as tenant of the whole premises. He wanted to

complete the matter at once, and not to wait until August 19, 1907, which was the first date upon which vacant possession could be given. Woolf was equally anxious to remain as tenant, and was very much annoyed at having to accept notice to quit.

After further correspondence and some interviews an agreement in writing, dated August 7, 1907, was entered into by which Woolf agreed with the plaintiffs to take the whole of the premises on a weekly tenancy as from August 12, 1907, at a rent of 2*l.* 10*s.* a week and to pay the rates and taxes, and the plaintiffs accepted him as a tenant on these terms; and his Lordship found that, although Woolf's fixtures had been mentioned, there had been no agreement with respect to his claims (if any) in respect of the same.

On August 9, 1907, the surrender was executed, and the money which was payable was paid. The surrender was by deed, and thereby, after reciting the agreement for surrender, in consideration of the payment of 100*l.* by the tenant to the landlord and the release by the landlord of the liability under the covenants, and particularly under the covenant to repair, the surrenderor, as beneficial owner, surrendered and assigned unto the plaintiffs "The said hereditaments and premises"—that is, the hereditaments which had been already specified and referred to in the recital of the lease—"comprised in or demised by the said recited indenture of lease and now known as No. 102, Whitechapel Road and 16, Vine Court aforesaid to the intent that the residue now unexpired of the term of years subsisting under or by virtue of the said indenture of lease may merge and be extinguished in the freehold and inheritance of the said premises"; and then followed a release by the plaintiffs of the liability under the covenants contained in the lease. This surrender was by arrangement dated August 6, 1907, so as to make it precede the agreement of August 7, by which the defendant was on August 12 to become the tenant of the plaintiffs.

On August 20, 1907, the London County Council served on the premises a "Dangerous structures" notice, and on September 12, 1907, the plaintiffs served Woolf with a notice requiring him to quit and deliver up the premises on September 23, 1907. Woolf having removed from both messuages doors, iron sheeting

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attached to the wooden framing of cubicles, parts of an iron staircase, and other things, which he claimed to be entitled to remove as trade or ornamental fixtures or movable chattels, the plaintiffs brought the present action against him, claiming an injunction and damages. The action was tried by Parker J.

Buckmaster, K.C., and *W. H. Draper*, for the plaintiffs. There was a complete surrender of the lease to the plaintiffs, and on August 7, 1907, defendant entered on a new tenancy. He cannot remove any fixtures which he annexed prior to the surrender and while he was the tenant of Abrahams. Fixtures can only be removed during the continuance of the tenancy; when the term has come to an end the right of removal is gone: *Fitzherbert* v. *Shaw*. (1) A tenant remaining in possession after the end of the term may during that possession remove fixtures: *Penton* v. *Robart*. (2) But if the tenancy has come to an end, and the tenant accepts a new lease from a new landlord, there is no right to remove. The surrender operated as an agreement to quit, and the fixtures cannot be removed: *Heap* v. *Barton*. (3) "The rule to be collected from the several cases decided on this subject seems to be this, that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant": per Alderson B. in *Weeton* v. *Woodcock* (4); 2 Smith's L. C. 11th ed. p. 219.

A surrender by a lessee does not affect the rights of his sub-tenant unless the latter joins in the surrender, but if the sub-tenant consents to the surrender, the whole term and all the rights of the lessee and the sub-tenant are gone. Abrahams in his letter of June 11, 1907, expresses his willingness to surrender the premises "in their present condition." That means that the fixtures are to be included in the surrender, and the defendant has acquiesced in the surrender and taken a new tenancy of the landlord's property, including the fixtures. He cannot remove any of the landlord's property.

Gore-Browne, K.C., and *H. S. Cautley*, for the defendant.

(1) (1789) 1 H. Bl. 258.
(2) (1801) 2 East, 88.
(3) (1852) 12 C. B. 274.
(4) (1840) 7 M. & W. 14, 19.

During his original weekly tenancy the defendant put up fixtures and fittings for the purposes of his trade. The surrender was negotiated by Abrahams and his solicitors, but nothing which happened before the date of his notice can affect the defendant's right to remove his fixtures. The surrender was not intended to affect his rights. Whatever the text-books say, there is no authority to support the proposition that a surrender and a new lease take away the tenant's right of removal.

Ground leases usually contain covenants to give up the premises and fixtures at the end of the term, but even then, although landlord's fixtures must be left, tenant's fixtures need not be. The Court always leans towards allowing the tenant to take away tenant's fixtures, and it requires a very clear expression of intention to that effect in a lease to justify the taking away of a tenant's legal right to remove trade fixtures: *Duke of Beaufort* v. *Bates.* (1)

In *Bishop* v. *Elliott* (2) a covenant to deliver up at the end of the term "articles in the nature of fixtures, which shall at any time, during the said term, be fixed or fastened to the said demised premises," was held not to prevent the tenant from selling either the trade fixtures or tenant's fixtures. In *Dumergue* v. *Rumsey* (3) it was held that a covenant to deliver up all the things fixed to the premises during the term only referred to landlord's fixtures.

Again, a covenant "to leave at the disposal of the lessors all the fixed materials of what nature or kind soever" does not include tenant's fixtures: *Sumner* v. *Bromilow.* (4) The words of the covenant in the present case are only applicable to landlord's fixtures.

[PARKER J. referred to *Wilson* v. *Whateley* (5); Amos and Ferard on Fixtures, 3rd ed. p. 152.]

Fitzherbert v. *Shaw* (6) is not an authority for the proposition in support of which it is cited in 2 Smith's L. C. 11th ed. p. 211. In *Ex parte Baroness Willoughby D'Eresby* (7) the point was left

(1) (1862) 3 D. F. & J. 381.
(2) (1855) 24 L. J. (Ex.) 229.
(3) (1863) 33 L. J. (Ex.) 88.
(4) (1865) 34 L. J. (Q.B.) 130.
(5) (1860) 1 J. & H. 436.
(6) 1 H. Bl. 258.
(7) (1881) 44 L. T. 781.

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open whether, when the tenant who annexed the fixtures took a renewal of his lease, the fixtures would, in the absence of express stipulation by the landlord, be deemed part of the property demised by the new lease. [They also referred to *Thresher* v. *East London Waterworks Co.* (1)]

Buckmaster, K.C., in reply. A covenant to deliver up fixtures at the end of the term to the landlord cannot mean only that he is to have what he would be entitled to without the covenant. The actual decision in *Dumergue* v. *Rumsey* (2) does not apply to the present case. An underlessee is bound by covenants as to fixtures in the lease which affect the lessee: *Porter* v. *Drew*. (3)

PARKER J. This is an action to restrain the defendant from removing from the plaintiffs' premises certain things which the former desires to remove, and claims the right to remove, as tenant's and trade fixtures. The premises in question, which adjoin each other and are known as No. 102, Whitechapel Road and No. 16, Vine Court, were until recently subject to a lease dated November 28, 1851, for a long term of years. On June 17, 1890, the lease became vested in Morris Abrahams, the defendant's father-in-law, who sub-let the whole premises to the defendant as a weekly tenant at a rent of 2*l.* per week, the defendant paying all rates and taxes. Parts of the premises were from time to time sub-let by the defendant, but he retained parts in his own possession, and has for many years used the same as a common lodging-house licensed by the local authority. It is not disputed that the defendant had notice of the terms of the original lease when he took his sub-tenancy. Even if he had no express notice, he must be taken to have had notice on the principle of *Patman* v. *Harland*. (4) The defendant therefore, as against the ground landlord, had no greater right to remove fixtures which are, in the contemplation of law, tenant's fixtures or trade fixtures than was possessed by the lessee Morris Abrahams; and a lessee's right to remove fixtures which are trade fixtures or tenant's fixtures in the contemplation of law

(1) (1824) 2 B. & C. 608.
(2) 33 L. J. (Ex.) 88.
(3) (1880) 5 C. P. D. 143.
(4) (1881) 17 Ch. D. 353.

may, of course, be limited by express agreement contained in the document under which the tenancy is created.

The first point which I have to decide is, therefore, whether the lease of 1851 contains anything which can be construed to limit the lessee's right in respect of the removal of tenant's or trade fixtures. The lease of 1851 contains a demise of a strip of vacant ground running back from the Whitechapel Road to No. 16, Vine Court and of No. 16, Vine Court itself. It also contains a covenant by the lessee to lay out 200*l.* at the least in building and completing, fit for habitation, a substantial messuage on the vacant ground, such building and completing to be done to the satisfaction of the surveyor appointed under the Metropolitan Building Act. It also contains a covenant to repair all existing and future buildings on the demised premises, and also a covenant to deliver up in repair on the determination of the lease as well No. 16, Vine Court as the messuage to be erected on the vacant ground in question, with all and singular the fixtures and articles belonging thereto.

The question is whether these last words can be limited to landlord's fixtures, or whether they extend also to fixtures which, in default of express provision, could be removed by the tenant as being in the nature of a tenant's or trade fixtures. There is authority for the proposition that where the lease itself, reasonably construed, contains clauses or expressions which point to the delivery up of landlord's fixtures only, such a construction cannot be objected to on the ground that the covenant would thus only impose an obligation with regard to landlord's fixtures which the law would impose without the aid of such a covenant. This, I think, is the effect of *Bishop* v. *Elliott* (1) (see in particular the last paragraph of the judgment of Coleridge J.) and also *Dumergue* v. *Rumsey* (2) (see in particular the judgment of Williams J. (3)).

But I can find no authority which decides that a covenant to deliver up the demised premises and all fixtures belonging thereto, without any further explanatory words or clauses, is confined to landlord's fixtures.

(1) 24 L. J. (Ex.) 229. (2) 33 L. J. (Ex.) 88.
(3) 33 L. J. (Ex.) 90.

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In the present case it is difficult to see how the house covenanted to be built could have been made fit for habitation in accordance with the covenant without affixing things, such as, for example, fire-grates, which might under some circumstances be tenant's fixtures; and it is impossible to say at this distance of time (the lease having been granted in 1851) what things in the nature of fixtures were provided by means of the 200*l.* which the lessee covenanted should be expended in erecting and completing the house fit for habitation. The object of the covenant may thus very well have been—and, indeed, I have come to the conclusion that it was—to prevent difficulties arising on these points by making the obligation to deliver up in repair extend not only to landlord's fixtures, but to all fixtures on the premises of whatsoever nature they might be. If it be limited to landlord's fixtures, as argued by Mr. Gore-Browne, it adds nothing to the ordinary obligations of a lessee.

Assuming, however, that I am wrong in this, I will pass to the second point in the case. [His Lordship here stated the facts above set out, beginning with the words "In the spring of 1907" and ending with the words "if the matter still remained in negotiation," and continued:—]

Now it seems to me that a tenant who contracts for the surrender of his lease to his landlord is in the same position as if he had contracted to sell the lease, and cannot as against the surrenderee, any more than he could as against a purchaser, remove fixtures which were upon the freehold at the date of the contract, even though they might be of the nature of tenant's or trade fixtures. No contract for the surrender of the lease would, however, affect his sub-tenants or alter their rights without their consent, though, if a sub-lessee stepped in and rightfully removed fixtures after such a contract to surrender, the lessee might be unable to complete the surrender which he had contracted to make, or might be bound to make compensation for breach of his contract. I also think that a contract to surrender a lease is a contract to surrender in possession free from sub-tenancies, and is not a contract to surrender subject to such sub-tenancies as may have been created by the surrenderor.

This position appears to have been accepted by the solicitors

for both parties. The solicitors accordingly first directed their attention to ascertaining whether there were any tenancies and sub-tenancies and how the same were to be dealt with. [His Lordship stated the facts from July 1 down to the execution of the surrender, and, having stated the contents of the surrender, continued as follows:—]

On the construction of the surrender I am of opinion that all fixtures are included in the premises surrendered. If, as I think is at any rate arguable, the defendant was a consenting party to this surrender, his tenancy would be determined thereby, and any right he might have to remove fixtures would be gone. If he cannot be considered to have been a consenting party to the surrender, then during the three days between August 9 and 12, upon which last-mentioned day he became tenant under the agreement of August 7, he would, I suppose, be in law the tenant of the plaintiffs under the sub-tenancy created by Morris Abrahams, which would not be determined by the surrender if he were not a consenting party, and which in normal course would not come to an end until the expiration of the notice determining it, namely, August 19. On the other hand, his term, or the remainder of his term, would be surrendered as soon as the defendant became tenant under the agreement of August 7. If during these three days the defendant had removed the fixtures which he now claims to remove (assuming, of course, that he had a right to remove them notwithstanding the terms of the original lease), in my opinion there would have been a breach by Morris Abrahams of the covenants for title implied by his surrender as beneficial owner.

The defendant claims now, not only that he had the right to remove during those three days the fixtures which had been affixed by him to the freehold during his tenancy under Morris Abrahams, but that the right continued after the determination of such tenancy by the acceptance of a new tenancy under the agreement of August 7. It seems to me that there is no precise authority deciding that a tenant loses his right to remove tenant's fixtures by the surrender of his tenancy to, and the acceptance of a new tenancy from, his landlord.

It is quite clear that he loses the right by a surrender alone,

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but it is said that this applies only when he ceases to be the tenant, and not to cases where the tenancy is merely surrendered in order that a new tenancy on the same or different terms may be created so that he does not go out of possession of the property at all. In my opinion, however, if the tenant upon the surrender of his lease in order that a new lease may be granted makes no stipulation to the contrary, he does lose his right to remove tenant's fixtures, for the surrender of the demised premises prima facie includes fixtures, and the subject of the new lease is prima facie what is surrendered in order to be re-demised. Furthermore, it may well be that the value of the fixtures the right to remove which is thus abandoned is a material consideration in settling the terms of the new lease. The right to remove fixtures erected during the term is, I think, a right coupled with and dependent upon the termor's interest. Prima facie when this interest ceases the right is gone, though there are, no doubt, exceptional cases in which, where the termor has remained in possession after the expiration of his term under such circumstances that the period of such possession can be looked upon as a mere prolongation of the term, he has been allowed to exercise the right after the term is ended. This seems to me to be the effect of *Fitzherbert* v. *Shaw* (1), *Heap* v. *Barton* (2), *Weeton* v. *Woodcock* (3), *Mackintosh* v. *Trotter* (4), and *Thresher* v. *East London Waterworks Co.* (5), and I do not think that *Penton* v. *Robart* (6) really contains anything to qualify the effect of those decisions. The law on the subject is summed up more or less by Thesiger L.J. in *Ex parte Brook.* (7) I will read the following passage in his judgment: "The general presumption of law with reference to tenant's fixtures remaining affixed to the freehold when a term comes to an end is, that 'they become a gift in law to him in reversion,' and are, therefore, not removable (per Lord Holt in *Poole's Case.* (8)) That general presumption has, however, been made subject to a qualification which is expressed in the proposition laid down by the Court of Exchequer

(1) 1 H. Bl. 258.
(2) 12 C. B. 274.
(3) 7 M. & W. 14.
(4) (1838) 3 M. & W. 184.
(5) 2 B. & C. 608.
(6) 2 East, 88.
(7) (1878) 10 Ch. D. 100, 109.
(8) (1703) 1 Salk. 368.

in *Weeton* v. *Woodcock* (1) in these terms—viz., 'that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant,' or, in the language of Parke B. in *Mackintosh* v. *Trotter* (2), 'that the tenant has the right to remove fixtures of this nature during his term, or during what may for this purpose be considered as an excrescence on the term.' Much reliance has been placed in argument on the part of the respondent upon this qualification of the general presumption of law, and it has been urged upon us that in this case the period between the appointment of the trustee and the disclaimer was such an 'excrescence' on the term, and that the respondent had during that period a right to consider himself as tenant. We cannot accede to that argument. It is not easy to define precisely what was meant by the propositions to which we have just referred, and we observe, that as regards the rule laid down in *Weeton* v. *Woodcock* (1), the difficulty which we feel in understanding its exact meaning was shared in by the Court of Common Pleas, as stated by Willes J. in delivering the judgment of that Court in *Leader* v. *Homewood*. (3) It may be that in cases where a tenant holds over after the expiration of a term certain under a reasonable supposition of consent on the part of his landlord, or in the case where an interest of uncertain duration comes suddenly to an end, and the tenant keeps possession for such reasonable time only as would enable him to sever his fixtures and to remove them with his goods and chattels off the demised premises, or even in cases where the landlord exercises a right of forfeiture, and the tenant remains on the premises for such reasonable time as last referred to, the law would presume a right to remove tenant's fixtures after the expiration or determination of the tenancy. But, however that may be, we are clearly of opinion that the case of a surrender of a lease by a tenant, while tenant's fixtures remain affixed to the freehold, does not, either upon principle or the authority of decided cases, give any right to the tenant subsequently to

(1) 7 M. & W. 19. (2) 3 M. & W. 184.
(3) (1858) 5 C. B. (N.S.) 546, 553.

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remove such fixtures. At the date of the surrender they form part of the freehold, and the law has no right to limit the effect of the surrender by excluding from it that which legally passes by it, and which has not been excluded from it by the bargain of the parties." Possibly, where the surrender is a surrender by operation of law upon the taking of a new lease, it may, under certain circumstances, be inferred that what is surrendered and re-demised is not the premises in their actual condition, but the premises minus the tenant's fixtures. Possibly also, parcel or no parcel being a question of fact, evidence might be admitted under this head. There may, too, be cases where the terms of the existing tenancy are varied only without the creation of a new tenancy: but in the present case I am of opinion that what Morris Abrahams contracted to surrender, and did surrender, included all fixtures; that what was agreed to be let to the defendant under the agreement of August 7, 1907, was what Morris Abrahams agreed to surrender, and subsequently did surrender; and that, by accepting the tenancy commencing on August 12, 1907, the defendant himself surrendered such tenancy as he might have had in the premises, and with it any right which he might have had to remove fixtures as an incident of the tenancy. This, indeed, seems to me to be the only conclusion consistent with the surrounding facts.

Under those circumstances I need not consider whether the particular things which the defendant claims a right to remove are or are not tenant's or trade fixtures. I may say, however, that I am not satisfied that by any means all the things which he claims fall within this category.

His Lordship accordingly made a declaration that the defendant was not entitled during his tenancy or otherwise to remove any fixtures, whether trade or tenant's fixtures, affixed to the premises prior to August 12, 1907, with liberty to the plaintiffs to apply.

Solicitors for plaintiffs: *Merrimans & Thirlby.*
Solicitor for defendant: *Henry Benjamin.*

F. E.

In re HUDSON.
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[1907 H. 1680.]

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Jan. 21, 22;
Feb. 12.

Will—Intestacy—Real Estate—Copyholds—Equitable Interest—Resulting Trust—Descent—Customary or Common Law Heir.

Where a testator has died intestate as to copyholds, held under an implied or resulting trust for him, and there is no special custom of the manor confining the custom of descent to a tenant on the rolls, or to a tenant dying seised, the equitable interest in the copyholds will descend, as the legal estate would have descended, to the customary heirs, and not to the common law heir, of the intestate.

Trash v. *Wood*, (1839) 4 My. & Cr. 324, applied.

Adjourned Summons.

By his will, dated February 16, 1905, Alfred Bernard Hudson, of Reeth, in the county of York, devised the Buck Inn, Reeth, and premises (as purchased by him in the year 1895) to the defendants, Ann Alderson and her daughters Mary Margaret Alderson and Sarah Emma Alderson, as tenants in common; and after making various specific bequests and giving legacies to the same three persons, he gave and bequeathed all the residue of his personal estate to the plaintiffs Gilbert Kennedy Cassels and William Henry Wheeler, upon trust, at their discretion, to sell and convert the same into money, and to pay the annual income thereof to his wife during her life, and after her death to stand possessed of his said residuary estate in trust for his sons, the defendants Ronald and Gilbert, in the proportions there mentioned. And the testator appointed G. K. Cassels and W. H. Wheeler executors and trustees of his will.

The testator died on November 27, 1906, and his will was duly proved by his executors. He left his widow, Jane Brown Hudson, and two sons, Frederick Ronald Cassilis Hudson and Gilbert Bernard Hudson (in the will called Ronald and Gilbert).

The real estate of the testator at the time of his decease consisted of (inter alia) (1.) the Buck Inn, Reeth, with certain closes

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of land adjoining thereto, all of copyhold tenure; and (2.) two other closes, one of freehold land containing 5a. 0r. 19p., and one of copyhold tenure containing 3a. 2r. 26p., situate about three-quarters of a mile from the Buck Inn, and held of the manor of Healaugh New Land at Swaledale. These two last-mentioned closes were bought by the testator in September, 1895, from one Sarah Whitelock. By a deed of February 8, 1905, the testator conveyed the freehold close to the defendant Ann Alderson in consideration of 100*l.*, but nothing was in fact paid. By a deed of surrender dated February 17, 1905, the testator surrendered the copyhold close to Ann Alderson for the like consideration of 100*l.*, which was not in fact paid. Ann Alderson was duly admitted tenant to the copyhold property on the rolls, but she admitted that in respect of both these properties she was a trustee for the testator. Soon after the testator's death she conveyed the freehold portion to the executors of the testator, and by a deed of May 27, 1907, she executed a declaration of trust by which she declared that she held the copyhold portion in trust for the testator. The copyholds were held of the manor of Healaugh New Land in Swaledale under a custom by which, on the death of a tenant intestate, all the sons took equally as tenants in common, and there was no special custom that confined this custom of descent to a tenant on the rolls, or to a tenant dying seised.

The trustees of the will took out an originating summons against the two sons of the testator and the widow and specific legatees asking (inter alia) (1.) what property passed by the specific devise in the will to the defendant Ann Alderson and her daughters; and (2.) whether, upon the true construction of the will, the testator died intestate of his residuary real estate; and if it was so held, and if it was also decided, that the lands the subject of the resulting trust did not pass under the specific devise of the Buck Inn, &c., then whether the beneficial interest in the copyholds descended to the heirs according to the custom of the manor, or according to common law.

The Court held, on the first question, that the specific devise of the Buck Inn included the closes immediately adjoining, but not the two closes of freehold and copyhold lands purchased

by the testator in 1895; and, on the second question, that the testator died intestate as to his residuary real estate.

The question as to the descent of the copyhold closes at Reeth was then argued, and alone calls for a report.

S. Dickinson, for the trustees of the will. The question is whether these copyholds descend to the heirs according to the custom of the manor or to the heir at common law. The law as to the descent of copyholds upon an intestacy, where there is a resulting trust, is stated differently in the text-books. In Scriven on Copyholds, 7th ed. p. 177, it is stated that particular customs of descent extend to trust estates, but the trust must be executed, and not an executory or implied trust. Elton on Copyholds, 2nd ed. p. 139, and other text-writers on this subject do not support that view as to implied trusts, and it would seem that the customary descent will attach to an equity of redemption or a resulting trust.

H. J. H. Mackay, for the younger son of the testator and for the widow. It is admitted, and the text-books and authorities all seem clear upon this point, that the custom does not extend to the case of an executory trust. That was so held in the cases of *Roberts* v. *Dixwell* (1), *Starkey* v. *Starkey* (2), and *Payne* v. *Barker*. (3) Those cases, however, are no authority with regard to an implied trust or resulting trust. In Watkins on Copyholds, 4th ed. vol. i. p. 275, it is stated that an equity of redemption will follow the descent of the legal estate. In *Banks* v. *Sutton* (4) it is said "that trusts and legal estates are to be governed by the same rules . . . . it is so in the rules of descent, as in gavelkind and Borough English lands." This was followed in *Cowper* v. *Earl Cowper* (5), and both these cases were cited with approval by Page Wood V.-C. in *Buchanan* v. *Harrison*. (6) The rule as to descent is stated in Watkins on Descents, 4th ed. p. 219. Here there is a resulting trust in favour of A. B. Hudson, and, as the descent is according to the custom of gavelkind, the resulting use will descend to both his

(1) (1738) 1 Atk. 607.
(2) (1746) 8 Bac. Abr. 302.
(3) (1662) O. Bridg. 18.
(4) (1732) 2 P. Wms. 700, 713.
(5) (1734) 2 P. Wms. 720, 735.
(6) (1861) 1 J. & H. 662, 676.

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sons equally. That is in accordance with *Fawcet* v. *Lowther* (1), where the equity of redemption followed the custom attached to the legal estate: Robinson on Gavelkind, 3rd ed. pp. 98, 99; *Blunt* v. *Clark* (2); *Vaughan* v. *Atkins* (3); *Barker* v. *Denham* (4); *Blackburn* v. *Graves.* (5) These cases bear out the statement of the general rule that where an equitable estate exists in copyholds, then that equitable estate descends according to the same rule of descent that applies to a legal estate in copyholds.

Ashton Cross, for the eldest son of the testator. In *Roberts* v. *Dixwell* (6), which was no doubt a case of an executory trust, the rule of common law descent was held to apply. In *Trash* v. *Wood* (7) an equitable estate tail in copyholds was held to pass, according to the custom of the manor, to the younger son. But that was not a case of a resulting trust similar to the present. There is a passage in Scriven on Copyholds, 7th ed. p. 176, which appears to be against my contention that the copyholds here descend to the common law heir. It is there stated that the customary descent attaches to "resulting uses, or reversions in fee of copyholds." But the two cases cited in support of the proposition, namely, *Fawcet* v. *Lowther* (1) and *Doe* v. *Easley* (8), do not bear it out. The first was the case of an equity of redemption following the custom as to the legal estate; and the second related to the reversion in copyholds. Neither had anything to do with a resulting trust like the present. The precise point is therefore bare of authority.

L. R. Ryland, for the specific devisees.

H. J. H. Mackay, in reply. *Trash* v. *Wood* (7) is in my favour. The present case cannot be brought within the rule as to an executory trust.

Cur. adv. vult.

Feb. 12. EVE J. delivered the following written judgment:— Alfred Bernard Hudson, the testator in this matter, purchased in the year 1895 certain freehold and copyhold hereditaments situate at Reeth, in the county of York, and at or shortly after

(1) (1751) 2 Ves. Sen. 300.
(2) (1657) 2 Sid. 61.
(3) (1771) 5 Burr. 2764.
(4) (1648) Sty. 145.
(5) (1672) 1 Mod. 102.
(6) 1 Atk. 607.
(7) 4 My. & Cr. 324, 329.
(8) (1835) 1 C. M. & R. 823.

the purchase was admitted tenant of the copyholds which were held of the manor of Healaugh New Land in Swaledale. On February 8 and 17, 1905, the testator respectively conveyed and surrendered the said freeholds and copyholds to the defendant Ann Alderson. The consideration in each case, that is, for the conveyance and the surrender, was stated to be the sum of 100*l.*, but no consideration in fact passed in respect of either transaction, and Ann Alderson admits that she is and always has been, since the conveyance and surrender, a trustee for the testator and those claiming under him. On February 16, 1905, that is to say, contemporaneously with the foregoing transactions, the testator executed his will. He makes no mention therein of the conveyance or surrender, or of the hereditaments respectively affected thereby, and, according to the construction which I have already put upon the will, he died intestate as to his residuary real estate. No evidence is before me to shew why the testator conveyed and surrendered the property to Mrs. Alderson, but it is suggested that he had some idea of thereby avoiding death duties. He died on November 27, 1906, leaving two sons, the elder (the defendant Frederick Ronald Cassilis Hudson) his heir-at-law, and the younger the defendant Gilbert Bernard Hudson. By the custom of the manor lands held of the manor descend on the death of a tenant intestate as of gavelkind tenure; and there is no special custom which confines the custom of descent to a "tenant on the rolls," or to a "tenant dying seised." Prima facie, therefore, in the events which have happened, the testator's equitable interest in the copyholds would devolve on the two sons as tenants in common. But the elder brother claims that, inasmuch as the equitable interest arose under an implied trust, that is, the resulting trust arising out of the surrender to Mrs. Alderson, the particular custom of descent does not apply; and he claims that the intestate's interest in the copyholds descends to him as the common law heir, and not to him and his brother as the customary heirs. This claim is admittedly based on a statement in Serjeant Scriven's well-known treatise on Copyholds, which is to be found on p. 177 of the 7th ed., by Mr. Archibald Brown. The passage, which is to be found also in

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at least two earlier editions, the 4th and the 5th, reads as follows: "Particular customs of descent extend to trust estates, except when confined to an actual seisin at the time of the death; but for this purpose, the trust must be an express executed, and not as executory trust or an implied trust." Before examining the authorities cited for this proposition, it is as well to see how far it agrees with the statements of other text-writers on the subject. All seem agreed that particular customs have no application to executory trusts, but, so far as implied trusts are concerned, Mr. Scriven would appear to stand alone. In Watkins on Copyholds, 4th ed. vol. i. p. 275, the case of a resulting trust is expressly dealt with in the following passage: "If a copyhold be surrendered on condition by way of mortgage, and the condition be broken, yet the equity of redemption shall follow the descent of the legal estate: thus if the copyhold were in Borough English, the equity would go to the youngest son; or if it were in gavelkind, to all the sons equally. And it is the same as to resulting trusts: as in the case of an undisposed residue, the portion undisposed of shall result as in freeholds." Again in Watkins on Descents at p. 219 of the 4th edition, by the late Mr. Joshua Williams, this statement is to be found: "The rule is that whatever portion of the estate, or use, or trust, is not disposed of, remains in the person who disposes; and will descend to his right heirs: for being part of the old estate, it shall continue to go as if no disposition at all had been made of it; i.e. if it had descended from the mother, to the heirs of the part of the mother, and vice versa." In Burton's Compendium of Real Property, s. 1395, on p. 537 of the 6th edition, it is stated as follows: "Where copyholds are made the subjects of trust, the equitable estate possesses in general all those incidents of the customary property which directly concern the tenant, but not those which are established merely for the benefit of the lord; it being sufficient for the latter to have the person named in the roll for his tenant, without troubling himself to know that he is a trustee. The rules of descent therefore, and the effect of words of limitation, are those which the custom prescribes." At pp. 98 and 99 of the 3rd edition of Robinson on Gavelkind it is stated: "The use also of gavelkind land shall follow

the nature of the land out of which it issues, and be partible among all the males, it not being a thing newly created, but the ancient use. And in Borough English the use shall descend to the youngest son. . . . . And the same it is at present of a trust."

Finally, the late Mr. Elton, adopting in part the language of Burton, says at p. 139 of the 2nd edition of his work on Copyholds and Customary Tenure: "Where copyholds are made the subject of a trust, 'the equitable estate possesses those incidents of the customary property which directly affect the tenant, and therefore the rules of descent are those which the custom prescribes.' There is, of course, an exception where . . . . the customary descent is only applicable to the case of a 'tenant' or a tenant 'dying seised.' The customary descent will attach in the case of an equity of redemption, or a resulting trust, or the case of a surrenderee dying before admittance." Such being the statements of those most eminently qualified to express an opinion upon the points under consideration, it is necessary to examine the authorities upon which the views of Mr. Scriven on the one hand, and those of the other text-writers I have quoted on the other hand, are respectively based. Three cases are cited in the note on p. 177 of Scriven, namely, *Roberts* v. *Dixwell* (1), *Starkey* v. *Starkey* (2), and *Payne* v. *Barker*. (3) In *Roberts* v. *Dixwell* (1) the testator directed his trustees to convey one fourth part of certain freeholds in trust for the separate use of his daughter for life, and from and after her decease in trust for the heirs of her body for ever. The daughter died before any conveyance was made, and the question arose what kind of estate the trustees ought to have conveyed to her had she been living, that is, whether in tail or for life only. The contest arose upon a claim by the daughter's surviving husband to a tenancy by the courtesy, and the principal question was whether the trust was executed or executory—for if executed the daughter was tenant in tail and her husband entitled to be a tenant by the courtesy—the contrary if executory only. The Lord Chancellor held that the daughter took an estate for life only.

Part of the land devised was of gavelkind tenure, and, the

(1) 1 Atk. 607. (2) 8 Bac. Abr. 302.
(3) O. Bridg. 18.

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daughter having left two sons, a further question was raised whether these particular lands must descend in gavelkind or go according to the rule of common law.

The Lord Chancellor, having, as I have said, expressed the opinion that the daughter took an estate for life only, disposed of this second point in the following terms (1): "As this is my determination on the construction of Sir Thomas Sandys' will, the estate must be conveyed to . . . . the eldest son of Priscilla, and the heirs of his body, with remainder to the second son and the heirs of his body, and not according to the custom of gavelkind, because, agreeable to the opinion I have now given, it must go according to the rule of common law, being not a trust executed, but executory, and to be carried into execution by this Court." This case, therefore, while supporting the statement in Scriven that the trust must be an executed and not an executory trust, is no authority for attaching a similar rule to an implied or resulting trust. *Starkey* v. *Starkey* (2) again deals with an executory trust and is indistinguishable from *Roberts* v. *Dixwell* (3) except that it deals with an estate in Borough English instead of in gavelkind.

It is thus referred to in Bacon's Abridgement, p. 302: "A surrender was made of an estate of the nature of Borough English, to the use of trustees, in trust after payment of an annuity and some particular debts, to surrender the same to the use of the heirs of the body of the husband and wife. The husband and wife had two sons, and when the annuity, &c., were at an end, they each of them claimed the surrender in their favour; the eldest son as heir of the body by the Common Law of England, and the younger as heir by the custom of Borough English, of which nature this estate was. But, as this was a trust merely executory, the Court directed a surrender to be made to the eldest son, as heir general by the Common Law."

Payne v. *Barker* (4) does not, in my opinion, really touch the point I have to decide. There it was held that the custom of a manor, found in a special verdict, being "that all customary lands have at all times descended, and ought to descend to the

(1) 1 Atk. 609.
(2) 8 Bac. Abr. 302.
(3) 1 Atk. 607.
(4) O. Bridg. 18.

youngest son, youngest brother, or youngest nephew, as the case may be," the heir of a surrenderee who died before admittance was not within the custom; and it was so held because a surrenderee before admittance was adjudged to have but a right, and so not to be within the words of the custom.

So much for the authorities cited in support of the proposition stated in Scriven. In support of the contrary contention that the equitable interest arising under a resulting trust follows the custom as to the descent of legal estates, I have been referred to *Fawcet* v. *Lowther* (1), *Blunt* v. *Clark* (2), *Vaughan* v. *Atkins* (3), *Barker* v. *Denham* (4), *Blackburn* v. *Graves* (5), and *Trash* v. *Wood.* (6) No one of these cases deals with an implied trust of the exact nature I have to consider here; but, on the other hand, the decisions would all appear to proceed upon the footing that equitable interests descend as the legal estate. Thus, in *Fawcet* v. *Lowther* (1), which was the case of an equity of redemption in copyholds mortgaged by conditional surrender, Lord Hardwicke L.C. says: "An equity of redemption will follow the custom as to the legal estate; as it does in Borough English lands; which if mortgaged, the equity of redemption will descend to the youngest son, to whom the lands will descend; so in mortgage of gavelkind, the equity of redemption will descend to all." In *Blunt* v. *Clark* (2) Glyn C.J. says: "If a man seised of copyhold in Borough English surrenders to the use of J. S. and his heirs, and J. S. dies before admittance leaving two sons, the younger of them shall have the land, because he is in by descent, or at least by force of the first surrender, and so in nature of a descent." And in *Vaughan* v. *Atkins* (3) the Court, through Lord Mansfield, citing the above, says: "With this reasoning we agree; and are of opinion, that upon admittance, the heir is in by descent, from the surrender, to which the admittance relates." *Barker* v. *Denham* (4) is not very satisfactorily reported, but in *Blackburn* v. *Graves* (5) Wylde J., referring to it sub nomine *Baker* v. *Dereham* (4), observes: "In the case of *Baker* v. *Dereham* (4) there was a

(1) 2 Ves. Sen. 300, 304.
(2) 2 Sid. 61.
(3) 5 Burr. 2787.
(4) Sty. 145.
(5) 1 Mod. 102.
(6) 4 My. & Cr. 324.

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surrender to the use of a man and his heirs of copyhold land that descended according to the custom of Borough English: the surrenderee died before admittance; and the opinion of the Court was, that the right would descend to the youngest according to the custom." Finally, there is the case of *Trash* v. *Wood* (1), wherein it seems to me that Lord Cottenham L.C. lays down the principle which I ought to apply. There, having determined that one Jonathan Trash, who had received the rents during his life, but had never been admitted, took an equitable estate tail, the Court had further to determine whether, upon his death, his heir-at-law or his customary heir (that is, the younger son) became entitled to this estate tail, and the Lord Chancellor deals with the question as follows (2): "The next question is, whether the heir-at-law or the customary heir of Jonathan Trash became entitled, upon his death, to the estate tail. The custom of the manor is, that the youngest son is the customary heir. The copyhold tenants are trustees, and the estate tail is of the equitable interest. Equity, therefore, has to look for the heir; and the question is, whether equity will not hold that person to be heir who would have inherited if the estate had not been in trust. In *Edwin* v. *Thomas* (3) this was assumed. Gilbert C.B., in his treatise on the Law of Uses and Trusts, states the rule generally as to all customary lands, as well as gavelkind and Borough English, as to which it is not disputed that the equitable interests descend as the legal estate. In *Roberts* v. *Dixwell* (4) Lord Hardwicke assumes that in trusts executed, as distinguished from trusts executory, the customary heir would be entitled. The distinction so taken leads to the consideration of the case of *Hale* v. ———, decided in the year 1660, and mentioned by Lord Holt in *Clements* v. *Scudamore* (5), in which it was held that a custom that the lands of a tenant dying seized descended to his youngest son, did not entitle the youngest son of a person whose lands had been surrendered to the use of him and his heirs, and who died before admittance, but that his common law heir was entitled. This case was relied

(1) 4 My. & Cr. 324.
(2) Ibid. 328, 329.
(3) (1687) 1 Vern. 489.
(4) 1 Atk. 607.
(5) (1702) 2 Ld. Raym. 1024.

upon in argument against the title of the youngest son here, but it was not a trust, and certainly not a trust executed. There was indeed a title in the father to be admitted; but that title was not complete when he died, and the decision seems to be founded upon the same principle as the rule referred to by Lord Hardwicke in *Roberts* v. *Dixwell* (1), that though the customary heir inherits in cases of trusts executed, yet the common law heir takes where the trust is executory. This case, therefore, does not appear to me to govern the present. It was argued that the custom, as proved by the witness, does not include the present case, because the witness speaks of it as applicable to tenants seized of lands. It is not to be expected that the court rolls should furnish evidence of a custom applicable immediately to trust estates, because all the transactions recorded in the court rolls are of transfers of the legal title. The title of the customary hæres, however, does not depend upon any custom as to equitable estates, but upon this, that the custom is proved to apply to legal estates, and that the descent of trusts executed follows the same rule."

The passage in Gilbert to which his Lordship refers is at pp. 18, 19, of Gilbert on Uses and Trusts, and is as follows: "As the Court of Chancery cannot alter the descent of the land, so it cannot alter the law and custom of a place; for all immemorial usages are part of the laws of the land. And so if a man makes a feoffment in fee of lands in Gavelkind, or Borough English, without a consideration, to the use of the feoffer and his heirs, this shall go to all the sons, or to the youngest, according to the custom."

The result is that, in my opinion, the course of the authorities is in one direction, and that as they at present stand, apart from the cases of executory trusts, equity follows the law, and that, in the case of a resulting trust which is executed and has none of the characteristics of an executory trust about it, the equitable interest descends as the legal interest would have descended. Accordingly I hold that the two sons succeed as customary heirs, and not the elder as heir-at-law.

Solicitors: *Petch & Co., for Rogers & Hudsons, Richmond, Yorkshire.*

(1) 1 Atk. 607.

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In re LORD GRIMTHORPE.
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[1907 G. 1457.]

Settlement—Real Estate—Trust for Conversion at future Date—Failure of Objects—Date at which such Failure to be determined—Resulting Trust—Re-conversion—Will—Election—Estate Duty—Incidence.

By a marriage settlement real estates in L. were conveyed by a settlor to trustees, upon trust, after the death of the survivor of his parents and of himself, to sell the same, and to hold the proceeds for certain specified purposes for the benefit of his wife and children, with an ultimate trust for the settlor, his executors, administrators and assigns. All the purposes for which the conversion was directed eventually failed:—

Held, that the real estates at L. were nevertheless impressed with the character of personalty from the day of the execution of the settlement, that being the material date whereon to determine whether the purposes for which conversion was directed had failed.

Clarke v. *Franklin*, (1858) 4 K. & J. 257, followed.

Ripley v. *Waterworth*, (1802) 7 Ves. 425, discussed.

By his will made in the lifetime of his wife the settlor devised and appointed his "interest in the estates in L." under his marriage settlement to "my successor as Lord G. in fee." And by one out of many codicils, made after the death of his wife without ever having had any children, he appointed "my L. estates" to his nephew, who, in fact, succeeded him as Lord G.:—

Held, that the testamentary dispositions of the testator effected a reconversion of the property from personalty into realty, since, at the moment of his death, he was in a position to elect, and had in fact elected, that the property should devolve as realty; and therefore the estate duty payable in respect of the L. estates was properly payable by Lord G.

The plaintiffs in the action, William Gervase Beckett, Alfred James Bethell, George Richard Bethell, and Francis Blake Lascelles Herbert Beal, were the executors of the will and codicils of the late Lord Grimthorpe.

The defendants were the Right Hon. Ernest William Baron Grimthorpe, Walter Vavasour Faber (one of the residuary legatees under the above-mentioned will, and appointed to represent them all), and John Corrie Carter, Arthur Frederick D'Oyly,

and Philip Herbert Martineau, the executors of the will of John G. Lonsdale, the surviving trustee of a settlement of September 30, 1845. The facts of the case, substantially taken from the judgment of the Court, are as follows:—

By an originating summons taken out on July 23, 1907, by the executors of the will and codicils of the late Lord Grimthorpe, the question was raised whether certain estates in Lincolnshire, in which the testator was interested, devolved upon the respondent, the present Lord Grimthorpe, as realty or personalty. The incidence of the estate duty payable on the death of the testator in respect of his interest in the property depended upon the answer to that question.

In October, 1845, the late Lord Grimthorpe, then Mr. Edmund Beckett-Denison, the eldest son of Edmund Denison and his wife Maria Denison, and then aged twenty-nine, intermarried with Miss Fanny Catherine Lonsdale. At that time Lord Grimthorpe's parents were both living, and at the date of the settlement made in contemplation of his marriage the estates in Lincolnshire, to which the summons related, stood limited under a post-nuptial settlement entered into by Lord Grimthorpe's parents in 1816, to the use of trustees upon trust for the mother for life, and after her death for the father for life, if surviving, and after the decease of the survivor of the said Edmund Denison and Maria Denison, to the use of the first and every other son of the body of the said Maria Denison by the said Edmund Denison begotten, severally and successively according to priority of birth, and the heirs male of his body. By his marriage settlement, dated September 30, 1845, Lord Grimthorpe disentailed the Lincolnshire estates, and the same were thereby conveyed to trustees, upon trust, during the lifetime of Lord Grimthorpe's parents and the survivor of them, to receive certain annual payments therein mentioned. And it was thereby declared that, after the death of the survivor of his parents, the said hereditaments and premises should be and remain to the use of Lord Grimthorpe for life, and after his death to the use of the trustees, upon trust, after the death of the parents, that the trustees should sell the same and invest the proceeds upon Government or real securities in England, or on the security of

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any joint stock company incorporated by Act of Parliament, and should stand possessed of the investments upon trust, in the first place, to pay the annual sum of 250*l.* to the said Fanny Catherine Lonsdale, if she should be then living, for her life, for her jointure in bar of dower, or, if she should be then dead, to such other person for life as Lord Grimthorpe by any instrument in writing, attested by two witnesses, should direct or appoint, and, in the next place, should stand possessed of any sum not exceeding 10,000*l.*, or of the securities on which the same should be invested, upon trust for such person or persons as Lord Grimthorpe should by his will direct and appoint, and should stand possessed of all the residue of the said trust money and securities, and of the interest, dividends, and annual proceeds thereof, in trust for such of Lord Grimthorpe's children or of their issue, or partly for such children and partly for such issue, as Lord Grimthorpe should by deed or will appoint, and, so far as no such appointment should be made or extend, as the said Fanny Catherine Lonsdale should, after his death, while remaining unmarried again in like manner appoint, and, so far as no such appointment should be made or extend, in trust for all Lord Grimthorpe's children who being males should attain twenty-one, or being females should attain that age or marry, in equal shares, and if but one then the whole for that one. And it was thereby agreed that in case there should be no child who should attain a vested interest in the trust premises, the same, or so much thereof as should not have been applied under the preceding trusts, should be held in trust for Lord Grimthorpe, his executors, administrators and assigns.

The survivor of Lord Grimthorpe's parents died in May, 1874, and on February 9, 1901, he made his will, which contained the following reference, and that reference only, to the estates in Lincolnshire: "I appoint and devise my estates at Grimthorpe and elsewhere in the East Riding, and my interest in the estates in Lincolnshire under my marriage settlement, dated 30th day of September, 1845, to my successor as Lord Grimthorpe in fee."

Lady Grimthorpe, formerly Miss Fanny Catherine Lonsdale, died on December 8, 1901. After his wife's decease the testator made twenty-five codicils to his will, but only one contained

any mention of the Lincolnshire estates, namely, the 10th, which was executed on December 14, 1902, and contained the following sentence: "But I leave my books and papers to my nephew Ernest, to whom also I appoint my Lincolnshire estates, except that I devise and appoint my property at Walkington in the East Riding to George Bethell." The testator died on April 29, 1905, without ever having had any issue, and was succeeded in the title by the first respondent to this summons, the present Lord Grimthorpe, who was the individual referred to as "my nephew Ernest" in the 10th codicil.

The testator never exercised the power which accrued to him under the settlement, on the death of his wife, of appointing the life annuity of 250*l.*, nor did he make any appointment of the 10,000*l.*, or any part of it. Within a week of the testator's death an action was instituted for the purpose of obtaining probate of the will and twenty-five codicils in solemn form, and various allegations and contentions were put forward by the defendants to the action.

The result of these conflicting contentions was that the parties to the action, and all persons interested under the will and twenty-five codicils or under a complete or partial intestacy, came to an arrangement which was embodied in a conditional agreement dated December 31, 1906. This agreement of compromise was duly approved by the Probate Division, and was filed and made a rule of Court. In accordance with the terms of this agreement the Lincolnshire estates were conveyed to the present Lord Grimthorpe. The construction of this agreement does not, however, call for notice.

A. J. Allen, for the plaintiffs, stated the points for decision.

Jessel, K.C., and *W. M. Cann*, for the defendant Lord Grimthorpe. The question under consideration is the incidence of the estate duty. We submit that the duty is payable out of the residuary personal estate.

Upon the execution of the settlement of September 30, 1845, the real estate was converted for all purposes: *Attorney-General* v. *Dodd* (1), referred to in *Attorney-General* v. *Johnson* (2); and

(1) [1894] 2 Q. B. 150, 155. (2) [1907] 2 K. B. 885, 893.

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the question is, not whether the land passes, but whether there has been any reconversion. The mere fact that in the circumstances Lord Grimthorpe was the absolute owner of the settled property cannot cause it to be regarded as anything other than money. There must be something indicative of an intention to reconvert, as pointed out by Lindley L.J. in *In re Duke of Cleveland's Estates.* (1)

Moreover, it is very difficult for a remainderman to reconvert. Lord Eldon, in *Wheldale* v. *Partridge* (2), said that there must be some act shewing an intention to reconvert, where the property was not "at home"; and *Meredith* v. *Vick* (3) and *In re Skeggs' Settlement* (4) shew that an intention to reconvert will not be readily assumed in the case of property in remainder.

In each particular case the only question is whether there have been acts sufficient to enable the Court to say that the person entitled to elect has in fact elected to take it in the one form or the other: *Harcourt* v. *Seymour* (5); *In re Douglas and Powell's Contract.* (6) All the cases shew that there must be some definite act shewing an intention to reconvert: *Parker* v. *Williams* (7); *Meek* v. *Devenish* (8); *Sisson* v. *Giles* (9); *Walrond* v. *Rosslyn.* (10)

In the present case we submit that the testator could never effectually, until his own death, have done or said anything which would have compelled the Court to say that he had elected to reconvert this property. There was no clear intention to reconvert shewn by the testator during his life, and the words in this particular will where he mentions "his interest in the Lincolnshire estates" are not sufficient to work a reconversion. The defendant's interest under the settlement is therefore money, and not land.

P. O. Lawrence, K.C., and *Lyttelton Chubb*, for those interested in the residue. First, these Lincolnshire estates were real estates, all along, in the hands of the testator. It is clearly

(1) [1893] 3 Ch. 244, 249, 250.
(2) (1800) 5 Ves. 387; on appeal, (1803) 8 Ves. 227, 235.
(3) (1857) 23 Beav. 559.
(4) (1865) 2 D. J. & S. 533.
(5) (1851) 2 Sim. (N.S.) 12, 45.
(6) [1902] 2 Ch. 296.
(7) (1867) 15 W. R. 1006.
(8) (1877) 6 Ch. D. 566, 573.
(9) (1863) 3 D. J. & S. 614.
(10) (1879) 11 Ch. D. 640.

settled that if there is a trust for sale of real estate, either for specific purposes, or out and out, and the specific purposes fail, then the property results to the heir-at-law as land. That is the principle of a resulting trust as laid down in *Ackroyd* v. *Smithson*. (1) It is admitted that if one of the purposes for which the conversion was directed exists, then the conversion would be effected. But here all the three specific objects of the conversion directed in the settlement have absolutely failed. The wife had died; there was no appointment made of either the annuity of 250*l*. or the sum of 10,000*l*., and there were no children. The ultimate trust of the residue for the settlor, his executors, administrators and assigns, was merely ancillary, and intended to sweep up any moneys not applied for the express purposes contemplated in the trust for conversion. The general principle laid down at the commencement of the judgment in *Ripley* v. *Waterworth* (2) applies. But in that case there was an agreement between three parties as to what was to be done with the partnership property at the end of the partnership, and the use of the words there in the gift to the testator, his executors, administrators and assigns, was not relied upon as conclusive in favour of the conversion. The proposition mentioned in Theobald on Wills, 7th ed. p. 259, with regard to the time when it is to be ascertained that the purposes have failed, is not really warranted by the case of *Carr* v. *Collins* (3) quoted in support of it. In that case conversion was necessary for some purposes, and the land was held to go as money accordingly. Where there is a future trust for the sale of land for the purposes of distribution, and the sale is not required, there is a resulting trust in favour of the heir as land. There is no direct authority which bears out the proposition that the failure of objects must take place at the moment of death in the case of a will, or at the date of the execution of a deed. There are dicta on the point in the case of *Clarke* v. *Franklin* (4), but it is not an authority which can be relied upon for the defendant, and the exact point did not arise in that case, which is distinguishable from the present. In *Hewitt* v. *Wright* (5) and

(1) (1780) 1 Bro. C. C. 503; 1 W. & T. L. C., 7th ed., p. 372.
(2) 7 Ves. 425, 434.
(3) (1843) 7 Jur. 165.
(4) 4 K. & J. 257.
(5) (1780) 1 Bro. C. C. 86.

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other cases there was some purpose upon which the trust for sale could operate; and *Emblyn* v. *Freeman* (1) cannot now be relied upon as an authority. In the present case, the objects of the conversion having entirely failed, the conversion does not take effect, and the property reverts to the grantor as real estate. But, secondly, assuming that the Court is against that proposition, then, under the will and codicils, the testator elected to treat this property as real estate, having, at the moment of his death, absolute dominion over the proceeds of sale. At that moment there was no purpose available except the trust for himself, his executors, administrators and assigns. The money was absolutely at home. By his will he appointed and devised his interest in the Lincolnshire estates to "my successor as Lord Grimthorpe in fee." He therefore elected to pass it as real estate. Further, by his 10th codicil the testator appointed "my Lincolnshire estates." That could not possibly mean property converted into money. Therefore, on the construction of the will and codicils, there is clear evidence of intention to pass the estate as real property, and election is a mere question of intention: *Sharp* v. *St. Sauveur* (2); *Attorney-General* v. *Hubbuck.* (3) Thirdly, according to the construction of the deed of compromise of December 31, 1906, the present Lord Grimthorpe is precluded from saying that the Lincolnshire estates came to him as personalty.

Hon. F. Russell, for the representatives of the surviving trustee of the settlement.

Jessel, K.C., in reply. The case of *Attorney-General* v. *Hubbuck* (3) assists me. For fiscal purposes this is personal estate, and there should be no distinction between fiscal purposes and other purposes.

[EVE J. referred to the case of *In re Glassington* (4), where Joyce J., in quoting from Bowen L.J.'s judgment in *Attorney-General* v. *Hubbuck* (3), interposed the words "if it is bound" after the word "bound" in the quotation of the statement that "equity impresses upon the property that species of character for the purpose of devolution and title into which it is bound ultimately to be converted."]

(1) (1720) Prec. Ch. 541.
(2) (1871) L. R. 7 Ch. 343.
(3) (1884) 13 Q. B. D. 275, 289.
(4) [1906] 2 Ch. 305, 312.

In the present case the purposes have not wholly failed, and the principle of *Ackroyd* v. *Smithson* (1) does not therefore apply. In *Attorney-General* v. *Marquis of Ailesbury* (2) lands were conveyed to committee of a lunatic in trust for him, "his executors, administrators and assigns," and it was held that there was a conversion out and out. This property, therefore, comes to the executor, and is liable for the estate duty: *Forbes* v. *Steven.* (3)

Cur. adv. vult.

Feb. 15. EVE J., after stating the facts, continued:—Upon these facts three questions have been exhaustively debated before me—two of them of general application, and the third having reference to the particular facts of this case, and more especially to the contract embodied in the deed of compromise. The first of these questions relates to the settlement of 1845. Did that deed operate as a conversion out and out, and once for all, of the Lincolnshire estates, or was the contemplated conversion solely for purposes all of which have failed? and, if this latter be the case, Does the settled property result to the settlor as realty or personalty? The second question, which only arises in the event of the Court holding that the realty was finally converted by the settlement of 1845, is this: In the events which had happened, Was the late Lord Grimthorpe, at the time from which his will speaks—i.e., the moment of his death—able to elect whether he would take the settled property as realty or personalty? and, if so, Did he in fact elect to take it as realty? The third question, which again only arises in the event of the Court holding that the realty was not converted in 1845, and that Lord Grimthorpe could not or did not elect to take it as realty, turns upon the construction of the deed of compromise. Those who are interested in the residuary personalty of the testator contend that, whatever was the true nature of the testator's interest in the Lincolnshire estates, the present Lord Grimthorpe, having regard to the terms of the compromise, cannot now call upon the residuary personalty to discharge the estate duty on the estates which he, at any rate, has elected to take as realty.

(1) 1 Bro. C. C. 503; 1 W. & T. L. C., 7th ed., p. 372.
(2) (1887) 12 App. Cas. 672.
(3) (1870) L. R. 10 Eq. 178.

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I proceed now to deal with these three questions separately. And first, as to the true effect of the deed of 1845. On behalf of the respondent, Lord Grimthorpe, I am invited to look at that deed and to hold that, upon its true construction, there is no room left for the application of the principle established by the leading case of *Ackroyd* v. *Smithson* (1), there being no resulting trust thereunder to the settlor, because, in fact, the purposes for which the conversion was directed have not failed. It is pointed out that the ultimate purpose for which conversion is directed is the holding of the proceeds of conversion in trust for the settlor, his executors, administrators and assigns ; and it is urged, seeing that this trust extends to all the proceeds of conversion, that it is impossible to assert that the purposes for which conversion was directed have failed.

If this argument is well founded, it would certainly afford an answer to any claim to treat the estates as realty by virtue of any resulting trust to the settlor. Equally it seems to me it would have constituted a short and effective answer to the claim of the heir-at-law in the case of *Ripley* v. *Waterworth.* (2) It was apparently not put forward in that case, although, in the argument, stress was laid on the use of the words "executors, administrators and assigns" as being material to shew the quality of the estate. In that case three persons entered into a contract of partnership. One of them, the testator in the cause, being seized in fee of three undivided eighth parts of a freehold estate, and certain sugar houses, conveyed three-eighths, and by the same deed the remaining five-eighths were conveyed to trustees to the use of such person or persons as the three partners should jointly appoint, and in the meantime, as to the testator's three-eighths, to the use of the testator for the purpose of carrying on the partnership business, and, in default of appointment, upon trust that the trustees should, on the death of the shortest liver of the three partners, sell the entirety of the estate and the sugar houses, and apply the moneys arising from such sale, after discharging incumbrances, in discharging such of the joint debts of the partnership as the joint stock of the

(1) 1 Bro. C. C. 503 ; 1 W. & T. L. C., 7th ed., p. 372.
(2) 7 Ves. 425.

partnership might fall short of paying, and pay the residue between the three partners in the proportions following :—To the testator, his executors, administrators or assigns, three eighth parts, and the remaining five eighth parts between the other two partners. And the deed contained a proviso under which, in case there should be no such appointment, the surviving partners, or either of them, might, upon such terms as were therein mentioned, purchase the share of the shortest liver of the three partners in the said estate and sugar houses. The testator was the first of the three partners to die, and, no appointment of the property having been made, one of the surviving partners elected to purchase, and in fact purchased, the testator's three-eighths thereof. A question then arose whether the purchase-moneys were to be considered as real or personal estate, or, putting it in another way, whether it was a trust of real estate for the heir-at-law, or whether the deed had operated to convert the estate and sugar houses into personal estate.

Lord Eldon L.C. decided that, upon the construction of the deed, the parties had contracted that the property should be converted to all intents and purposes, and accordingly that the proceeds were personal estate; but neither in his judgment, nor in the arguments addressed to him, was it suggested that the trust to pay the residue to the testator, his executors, administrators or assigns, precluded the heir from asserting there was no conversion. The arguments for the heir proceeded on the footing that the trust for sale was only in aid of other funds, to pay the partnership debts; that there was no necessity for exercising it; and, accordingly, that, the purpose having failed, the estate retained its character of realty.

On behalf of those interested in the personal estate it was urged that the deed was in fact a contract of sale; that the purposes or objects of conversion were not limited to the payment of the partnership debts, but extended to obviate the inconvenient consequences of the surviving partners being entangled by a tenancy in common with the heir. The words "executors, administrators or assigns," were emphasized as being indicative of the quality of the estate, but were not relied on as conclusive on the question whether there had been conversion or not.

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In the present case the purposes for which conversion was contemplated were the provision of the life annuity of 250*l.*, and of the fund of 10,000*l.*, and the distribution of the residue amongst the settlor's issue; in default of issue such residue to be held in trust for the settlor, his executors, administrators and assigns.

I think the case I have dealt with is sufficient authority for holding that this ultimate trust of the residue of the proceeds of conversion for the settlor, his executors, administrators and assigns, is ancillary to the primary purposes for which conversion is directed, and does not of itself operate to prevent a resulting trust for the settlor arising in a case like the present, where all the primary purposes for which conversion was contemplated have failed, or to conclude the question whether the estate results to the settlor as realty or personalty.

But it is said that this being a trust for conversion created by a deed, and the deed operating from the time of delivery, the property is impressed, immediately upon the execution of the deed, with the character of personalty, and that, unless the whole purpose for which conversion is directed fails from the moment of the delivery of the deed, it retains this character, and cannot result to the settlor as real estate. The case of *Clarke* v. *Franklin* (1) is the authority relied on as supporting this contention. In that case Page Wood V.-C., quoting from the judgment in *Griffith* v. *Ricketts* (2), says: "'A deed differs from a will in this material respect. The will speaks from the death, the deed from delivery. If, then, the author of the deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal and not real estate from the delivery of the deed, and, consequently, at the time of his death. The deed thus altering the actual character of the property, is, so to speak, equivalent to a gift of the expectancy of the heir at law to the personal estate of the author of the deed. The principle is the same in the case of a deed as in the case of a will; but the application is different, by reason that the deed converts the property in the lifetime of the author of the deed, whereas, in the case of a will,

(1) 4 K. & J. 257, 263. (2) (1849) 7 Hare, 299.

the conversion does not take place until the death of the testator.' It is not a question of actual physical conversion of the property from real estate into personal property, but, whatever be the time at which that conversion is directed to take place, whether in the grantor's lifetime, or after his death, the grantor, by executing a deed of this description, says, in effect: 'From the time I put my hand to this deed, I limit so much of this property to myself as personal property.' "

Then, after dealing with *Hewitt* v. *Wright* (1) and *Wheldale* v. *Partridge* (2), the Vice-Chancellor says (3): "The principle of these authorities is therefore clearly settled; and where, as here, real estate is settled by deed upon trust to sell for certain specified purposes, and one of those purposes fails, there, whether the trust for sale is to arise in the lifetime of the settlor, or not until after his decease, the property to that extent results to the settlor as personalty from the moment the deed is executed. The only exception is, where the whole of the purposes for which conversion is directed fail from the moment of the delivery of the deed. In *Ripley* v. *Waterworth* (4) Lord Eldon admits, that, where conversion is directed for a particular and special purpose, or out and out, but the produce to be applied to a particular purpose, and the purpose fails, the intention fails, and this Court regards the grantor as not having directed the conversion. So here, if at the moment when the grantor put his hand to this deed, the purpose for which conversion was directed had failed—for instance, if he had given all the proceeds instead of a part to charitable purposes, so that the property would have been at home in his lifetime,—the Court would have regarded it as if no conversion had been directed, and the property would have resulted to the grantor as real estate. And so in *Hewitt* v. *Wright* (1), if the only purpose of conversion had been the gift to Dorothy on her marriage, and she had been already dead at the date of the deed without having been married, there again the Court would have regarded the grantor as not having directed a conversion. But here that consideration does not arise. Here some of the purposes for which conversion was directed had not

(1) 1 Bro. C C. 86.
(2) 8 Ves. 227.
(3) 4 K. & J. 265.
(4) 7 Ves. 425.

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failed when the deed was executed. It appears to me, therefore, that the property in question resulted to the grantor as personalty."

It is true that in each of the cases to which the learned judge referred there had been only a partial failure of the purposes for which conversion had been directed, and that in *Ripley* v. *Waterworth* (1) Lord Eldon says nothing about the date at which the question whether there has been a total failure or not has to be determined in the case of a conversion directed by deed; but I do not think there is any inconsistency between what was said there and in *Clarke* v. *Franklin* (2), and, upon the authority of the latter case, I am bound to hold that the date of the execution of the deed is the material date whereon to determine whether the purposes for which conversion is directed have in fact failed.

So doing, I cannot say that on September 30, 1845, the purposes for which the trust for conversion was created in the present case had failed; and accordingly I determine that the Lincolnshire estates were impressed with the character of personalty on that day, and thenceforth down to the settlor's death remained impressed with the same character.

This brings me to the second question I have to deal with—namely, Was the late Lord Grimthorpe, at the date of his death, in a position to elect whether he would take the property as realty or personalty? and, if he was in that position, Did he elect to take it and deal with it as realty? In other words, do his testamentary dispositions work a reconversion of the property from personalty into realty? On the first part of the question I think it clear that in the events which had happened—the death of Lady Grimthorpe, the omission by Lord Grimthorpe to appoint either the 250*l.* life annuity, or any part of the 10,000*l.*, and the failure of issue—Lord Grimthorpe was in a position to call for a reconveyance of the estates in their unconverted state. Whether in fact he has evidenced an intention so to do is a matter of greater difficulty to decide.

The law upon the matter is stated in the following terms in *Harcourt* v. *Seymour* (3): "Where, by a settlement, land has been

(1) 7 Ves. 425.
(2) 4 K. & J. 257.
(3) 2 Sim. (N.S.) 12, 45.

agreed to be converted into money, or money to be converted into land, a character is impressed upon it, until somebody entitled to take it in either form chooses to elect that, instead of its being converted into money or instead of its being converted into land, it shall remain in the form in which it is actually found. There can be no doubt that that is the law; and the only question in each particular case, is whether there have been acts sufficient to enable the Court to say that the party has so determined."

In *Meredith* v. *Vick* (1) the Master of the Rolls says: "Reconversion is a question of intention"; and he repeats (2): "It is a question of intention, and must be dealt with as such." And the late Byrne J., in *In re Douglas and Powell's Contract* (3), says: "To establish an election to take 'in specie' and free from a trust to convert, I think it is necessary to have sufficient evidence of the election to be derived from declarations or acts and conduct of the parties"; and a little lower down on the same page, after dealing with some of the reported cases, he adds: "In truth, all the cases turn on the particular facts."

Applying these principles to the facts of the present case, I turn to the will of the testator, and, observing that at the date when he made his will his interest in the Lincolnshire estates was not an indefeasible one, in that his wife was still alive and might survive him, and there was also a possibility of his having issue, I note that he "appoints and devises," as the subject of one gift, the estates at Grimthorpe, and in the East Riding, of which he was legal owner in fee, and his "interest in the Lincolnshire estates"; that the appointee and devisee is "my successor as Lord Grimthorpe"; and, finally, that the appointment and devise is to him "in fee"—that is, to him, his heirs and assigns. Then, after the death of his wife, he makes the 10th codicil, and thereby "appoints" "my Lincolnshire estates" to "my nephew Ernest," changing the expression from "my interest in the Lincolnshire estates" to "my Lincolnshire estates" because, as I apprehend, he appreciated that the death of his wife had

(1) 23 Beav. 559, 565. (2) 23 Beav. 567.
(3) [1902] 2 Ch. 296, 312.

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removed from the scene the third party who, had she survived, could have insisted on conversion, and without whose concurrence, while living, he could not have brought about a reconversion: *Sisson* v. *Giles* (1); *Walrond* v. *Rosslyn*. (2)

Adopting the opinion of Stuart V.-C. in *Sharp* v. *St. Sauveur* (3), I attach great importance to the words of limitation, "in fee." Dealing as I am with the will of a distinguished lawyer, it is impossible for me to believe that he did not appreciate the full significance of that expression, and I regard its use as a strong manifestation of his intention to take the property as realty. I think, too, the fact that he deals with the Lincolnshire estates as part of the property which is to devolve with the title manifests the same intention, and, although I feel the weight of the criticism which has been addressed to the clause in the will, I have formed the opinion that the testator did thereby elect that the property should devolve as realty, and that as such it accordingly devolved.

This really disposes of the question I have to decide, but, inasmuch as the case may go to another Court and my opinion may be overruled, I proceed to deal with the third question upon which I have heard arguments, namely, as to the effect of the deed of compromise. [His Lordship then considered the terms of the deed in question, and was of opinion that by the bargain come to and embodied in that deed the Lincolnshire estates were treated by the contracting parties as constituting no part of the testator's personal estate, but were referred to in terms as being included in the "rest of the testator's real estates," and therefore the present Lord Grimthorpe was precluded from successfully claiming to throw the burden of the estate duty payable in respect thereof upon the general personal estate.]

The result is that I declare that, under the will and codicils of the testator, the estates in Lincolnshire devolved on the defendant, Ernest William Baron Grimthorpe, as real estate, and that the estate duty payable on the death of the testator in respect of his interest in the said estates was properly payable

(1) 3 D. J. & S. 614. (2) 11 Ch. D. 640.
(3) L. R. 7 Ch. 343, 346.

by the said defendant. I order the costs of all parties to be taxed as between solicitor and client, and paid out of the residuary personal estate.

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Solicitors: *F. Beal; Meynell & Pemberton; Greenfield & Cracknall; Martineau & Reid.*

G. M.

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[1906 T. 1733.]

Settlement—Post-nuptial and Voluntary—Wife's Covenant to settle Property acquired during existing Coverture—Previous Marriage Settlement—Settled Fund—Power of Appointment on Failure of Issue—Reversionary Interest in default of Appointment—No Child—Dissolution of Marriage—Appointment to Self—Settled Land in Ireland—Wife entitled to Life Estate—Sale of Land—Twelve per cent. Bonus—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48—*Irish Land Act*, 1904 (4 *Edw.* 7, *c.* 34), *ss.* 3, 4.

By a voluntary settlement dated March 26, 1902, the applicant, a married woman, covenanted to settle all real and personal property to which she was then, or should at any time during her then present coverture become, entitled for any estate or interest whatsoever in possession, reversion, remainder, contingency, or expectancy. There was no child of the marriage, which was dissolved on the wife's petition as from June 9, 1904, and the property of the wife comprised in her marriage settlement was ordered to be conveyed to her as if the husband had died in her lifetime.

In these circumstances questions arose whether the trustees of the voluntary settlement were entitled by virtue of the above-mentioned covenant to the following moneys, namely:—

(1.) A sum of 2800*l.*, which became payable on April 12, 1905, representing the applicant's fund settled by her marriage settlement, and at the date thereof neither ascertained nor payable, over which fund, in the event of there being no child of the marriage, the applicant had a general power of appointment exercisable by deed while not under coverture, or by will whether covert or sole, and to which fund in default of any such appointment she was absolutely entitled if she survived her husband. On December 4, 1905, the applicant had appointed the marriage settlement funds to herself absolutely.

(2.) A sum of 241*l.* 4*s.* arising upon the sale by the applicant, as tenant for life, of certain land in Ireland comprised in the voluntary settlement, sold by her, after the dissolution of her marriage, under the provisions of the Irish Land Act, 1903. The sum in question represented the 12 per cent. bonus payable to vendors under s. 48, sub-s. 1, of that Act, and by

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virtue of the provisions of the Irish Land Act, 1904, belonged to the applicant, as tenant for life, as her "own proper moneys for" her "own use and benefit."

On the first question:—*Held*, that the determination of the question of title to the sum of 2800*l*. turned upon the distinction between power and property, and that although the exercise of the power after the dissolution of her marriage created property, yet during the coverture all that the applicant had was a power of appointment over the fund, and, a power not being within the scope of the covenant, the sum of 2800*l*. belonged to her absolutely.

Townshend v. *Harrowby*, (1858) 27 L. J. (Ch.) 553; 4 Jur. (N.S.) 353, followed.

Bower v. *Smith*, (1871) L. R. 11 Eq. 279, and *In re Lord Gerard*, (1888) 58 L. T. 800, commented upon.

Steward v. *Poppleton*, [1877] W. N. 29, and *In re O'Connell*, [1903] 2 Ch. 574, not followed.

On the second question:—*Held*, adopting the view taken of the nature of the bonus in *In re Lady Annaly's Trust*, (1904) 92 L. T. 13, and *In re Power's Estate*, [1907] 1 I. R. 51, that the bonus was not merely a by-product of the applicant's life estate, but was an interest in the settled hereditaments accruing to her when the Irish Land Act, 1903, interpreted by the Irish Land Act, 1904, came into operation on November 1, 1903, and that the bonus was caught by the covenant and must be retained by the trustees of the voluntary settlement.

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By the settlement, dated November 17, 1897, made upon her marriage, the applicant, Eleanor Elizabeth Rashleigh, settled (inter alia) a money fund, the amount of which was to be ascertained and become payable on the day of the death of the survivor of her parents, upon trust for investment and for payment of the income of the invested fund during the joint lives of the settlor and her husband and the life of the survivor of them as therein mentioned. Subject to these life interests, the fund was to be held upon trust for the issue of the marriage as the settlor and her husband should by deed, or the survivor by deed or will, appoint, and in default of and subject to any such appointment upon trust for the children of the marriage in equal shares, sons at twenty-one and daughters at twenty-one or on marriage; and if no child attained a vested interest, then the fund was to be held upon trust for such person or persons and purposes as the settlor should while not under coverture by deed revocable or irrevocable, or whether covert or sole by will or codicil, appoint, and in default of and subject to any such

appointment upon trust, if the settlor should survive her husband, for her absolutely, but if she should die in the lifetime of her husband, for her statutory next of kin as if she had died possessed thereof intestate and without having been married.

On the death of her mother on February 18, 1902, the applicant succeeded to an interest in certain lands and hereditaments in county Mayo, Ireland, known as Garracloon, under the will of Arthur Pugh Stewart. The nature and extent of that interest was at the date of the voluntary settlement next hereinafter mentioned very uncertain owing to difficulties of construction arising on the testator's will, but by an order made by the late Vice-Chancellor of Ireland on July 7, 1902, her interest was determined to be a life interest.

In the meantime, namely, on March 26, 1902, the applicant, being still under coverture, executed a voluntary settlement whereby, after reciting the relevant provisions of A. P. Stewart's will, his death, and the testamentary dispositions and death of her mother, and that she the settlor was desirous that all property to which she was entitled (except as thereinafter mentioned) should be settled in manner and upon the trusts thereinafter expressed, and also that such provision should be made for the settlement of her other or future acquired property as was thereinafter contained, she as settlor granted and conveyed to the defendants (and a third trustee, since deceased) all her estate and interest in the annual rents of the freehold of Garracloon to which she was entitled under or by virtue of the will of A. P. Stewart, to hold the same unto and to the use of the trustees, their heirs and assigns, upon trust if and so far as the said estate and interest of her the settlor therein was a life estate or any less interest, for her for her separate use without power of anticipation, and if and so far as the said estate and interest was a larger estate than a life estate, then upon trust to get in and convert the same and invest the proceeds and pay the income thereof to the settlor during her life for her separate use without power of anticipation, and after her death upon trust as therein mentioned. And it was thereby agreed and declared that if the settlor "now is or if at any time during her present coverture she shall become seised possessed

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or entitled of or to any real or personal property (other than the property hereby specifically settled) for any estate or interest whatsoever in possession reversion remainder contingency or expectancy," except as therein mentioned, "then and as often as the same shall happen all such real and personal estate (except as aforesaid) shall forthwith at the expense of the trust estate be assured or transferred by" the settlor to the trustees upon the trusts therein mentioned.

There was never any issue of the marriage, and by an order of the Divorce Court dated December 19, 1904, made on the petition of the applicant, the marriage was dissolved as from June 9, 1904, the date of the decree nisi, and by a further order of the same Court dated July 11, 1905, it was ordered that all the powers and interests of the husband under the marriage settlement should be extinguished, and that the trustees of the settlement should reconvey to the wife the property comprised in the settlement as if the husband were dead and had died in the lifetime of the wife.

Effect was given to the last-mentioned order by a deed dated December 4, 1905, whereby the applicant (in exercise of the power conferred upon her by the marriage settlement if there should not be any child of the marriage who attained a vested interest under the trusts in default of appointment among issue) irrevocably appointed that the trust funds should be held in trust for herself absolutely, and the trustees assigned to the applicant the specifically settled property and the benefit of the covenant to secure payment of the money fund above mentioned. This fund had in fact become payable on April 12, 1905, the date of the death of the applicant's father, and in February, 1906, was ascertained to be a sum of 2800*l.*, and was paid over in that month to and on the joint receipt of the applicant and the defendants, the trustees of the voluntary settlement, pending the determination of the question whether the money belonged to the applicant absolutely by virtue of the appointment of December 4, 1905, or whether it had been caught by the covenant to settle other and after acquired property contained in the voluntary settlement.

After the dissolution of her marriage the applicant effected

sales of the Garracloon estate under the Irish Land Acts, 1903 and 1904, at prices which reached a total of 2010*l.*, and which resulted in a bonus of 241*l.* 4*s.* (representing 12 per cent. on the purchase-money) being payable to the vendor under the provisions of those Acts. (1) The bonus was paid to the defendants, the trustees of the voluntary settlement, under an order of the Court of the Irish Land Commission dated August 1, 1906.

This was a summons by Mrs. Tremayne for the determination of the question whether both or either of the sums of 2800*l.*, marriage settlement moneys, and 241*l.* 4*s.*, bonus on the sale of the Irish land comprised in the voluntary settlements, were or was property within the meaning of the covenant to settle other and after acquired property contained in the voluntary settlement.

The question relating to the sum of 2800*l.* was argued and determined first.

Hon. Frank Russell, for the applicant. This sum of 2800*l.* is not caught by the covenant to settle other and after acquired property to which the applicant should become entitled during the coverture. All that the applicant had during the coverture was a testamentary power of appointment exercisable only in

(1) The Irish Land Act, 1903, provides as follows:—

Sect. 48: "(1.) For the purpose of aiding the sale of estates under this Act, the Land Commission may, in the prescribed manner and at the prescribed time, out of advances by the National Debt Commissioners from the said fund, pay to the vendor of each estate sold a sum calculated at the rate of twelve per cent. on the amount of the purchase money advanced under the Land Purchase Acts."

. . . . . .

Sect. 102: "This Act shall come into operation on the first day of November nineteen hundred and three."

The Irish Land Act, 1904, provides as follows:—

Sect. 3: "(1.) Where the vendor is a tenant for life or a person having the powers of a tenant for life under the Settled Land Acts, 1882 to 1890, the percentage shall, ... be retained by him as his own proper moneys for his own use and benefit, free and discharged from all claims upon the lands sold or the purchase money thereof and from any trust affecting the same."

. . . . . .

Sect. 4: "This Act shall be construed as one with the Irish Land Act, 1903, and may be cited with the Land Purchase Acts, and the said Act of 1903 shall be construed and shall take effect from the date of its passing as if this Act had then formed part thereof."

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the event of failure of children who took a vested interest. That power was not "property" subject to the covenant: *Townshend* v. *Harrowby* (1); *Bower* v. *Smith* (2); *In re Lord Gerard.* (3) The first of those authorities is a clear decision that a mere power is not caught by the covenant. No doubt the exercise of the power created property, but the power was not exercised and the property was not created until after the coverture had been determined.

The two decisions in *Steward* v. *Poppleton* (4) and *In re O'Connell* (5) are in conflict with the decisions in the cases already cited. The absolute character of the gift in *Steward* v. *Poppleton* (4) is enough to distinguish that case from the present, and in *In re O'Connell* (5) Kekewich J. merely followed *Steward* v. *Poppleton.* (4)

C. J. Mathew, for the respondent trustees. During the coverture the applicant was entitled to this sum in question contingently upon there being no child who should attain a vested interest, upon her surviving her husband, and upon her failure to exercise her power of appointment. She had therefore an interest in default of appointment which was caught by the covenant, and she was not entitled by any act of hers, namely, by any subsequent appointment, to derogate from her own grant: *Attorney-General* v. *Earl of Selborne.* (6)

With regard to the cases cited, *Townshend* v. *Harrowby* (1) is not distinguishable from *Steward* v. *Poppleton* (4), upon which I rely, and if the latter case was rightly decided, then the decision in the former case must be wrong. *Bower* v. *Smith* (2) was not argued, and the report of the case was afterwards corrected by Jessel M.R. in *Steward* v. *Poppleton.* (4) In *In re Lord Gerard* (3) North J. simply followed *Bower* v. *Smith.* (2)

In re O'Connell (5) also is in my favour. Kekewich J. there considered all the authorities and criticized the decision in *Townshend* v. *Harrowby* (1), saying that it was wrongly decided if the decision in *Steward* v. *Poppleton* (4) was sound.

(1) 27 L. J. (Ch.) 553; 4 Jur. (N.S.) 353.
(2) L. R. 11 Eq. 279; 19 W. R. 399.
(3) 58 L. T. 800.
(4) [1877] W. N. 29.
(5) [1903] 2 Ch. 574.
(6) [1902] 1 K. B. 388, 398.

Hon. Frank Russell in reply. This is the case of a power and not of property, and therefore the argument about derogation from grant has no application.

Cur. adv. vult.

Jan. 24. EVE J. stated the material facts as above set out and, after referring to the summons, continued:—That raises a question of the construction of the agreement to settle other and after acquired property. In construing such an agreement Bowen L.J. in *Scholfield* v. *Spooner* (1) says: "Whether property falls within a covenant to settle after acquired property or not, must turn, as it seems to me, upon the construction of the covenant. There has been laid down a canon with reference to the construction of such covenants, that when you find the property does not fit the trusts of the settlement, then you may assume as a consequence that it was not intended to come within the covenant at all. That seems to be good sense. But that rule itself is only to my mind a rule of construction, and the question must be, whether, on the true construction of the covenant, the particular property falls within it or not." Then he adds a note of warning which I think it is not out of place to read, seeing that in most of the cases to which I am about to refer the donor of the fund about which the question arose was avowedly trying to keep the fund out of the reach of the agreement to settle. He says: "If that is the right view, it cannot be material to consider the intention with which after acquired property has been given. A gift is not less a gift because the donor intends that it shall not follow the bargain which the party to whom it was given has made as to its devolution. You may look at the way in which it is given to see if it is a gift coming within the terms of the covenant to settle, but no declarations of intention as to what are to be the consequences can have any effect."

Turning now to the settlement of 1902, I have to determine whether the fund in question is or is not "property of or to which Mrs. Tremayne became seised, possessed, or entitled during her coverture."

(1) (1884) 26 Ch. D. 94, 101.

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In considering this question it is important to bear in mind the distinction between power and property. I know of no case where that distinction is defined with greater lucidity than it is in the case of *In re Armstrong* (1) by Fry L.J., who says: "The question is, whether the general power of appointment given to the bankrupt is her 'separate property' within the meaning of sub-s. 5 of s. 1 of the Act of 1882. To my mind the question is one of the most elementary description, and, if it had not been argued as it has, I should have thought it unarguable. No two ideas can well be more distinct the one from the other than those of 'property' and 'power.' This is a 'power,' and nothing but a 'power.' A 'power' is an individual personal capacity of the donee of a power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more his 'property' than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognizes are they 'property.' In one sense no doubt they may be called the 'property' of the person in whom they are vested, because every special capacity of a person may be said to be his property; but they are not 'property' within the meaning of that word as used in law. . . . . That being so, have the Courts of Equity ever said that such powers are 'property'? If they have, it would be our duty to follow their decision. But no such imputation can with propriety be cast on the Courts of Law or Equity; they have always recognized the distinction between 'power' and 'property.' I will illustrate this by referring to what was said by Kindersley V.-C. in *Vaughan* v. *Vanderstegen* (2), which for the present purpose expresses the law quite correctly. Having referred to several cases, the Vice-Chancellor said: 'These cases clearly recognize that a power of appointment given to a married woman, and a trust for her separate use, are perfectly distinct, even when they affect the same estate or interest; a fortiori, they are perfectly distinct when the trust for separate use affects only the life estate, and the power affects

(1) (1886) 17 Q. B. D. 521, 530-532. (2) (1853) 2 Drew. 165, 189.

only the reversion.' It must be observed that, whatever confusion (if any) has arisen in the Courts of Equity, is due to the fact that questions of this kind have very often arisen in reference to the claims of persons who have asserted their right as creditors to reach the separate estate of a married woman, and also property subject to her power of appointment, because in equity there were two doctrines by virtue of which relief was given to the creditors of a married woman." I need not follow that out, but the learned Lord Justice ends his judgment (1) by saying: "In truth a power is not 'property,' and the power of a married woman is not her 'separate property.' This power of appointment does not come within the words of the Act, and the appeal must be allowed."

Mr. Russell contends that the covenant here extends to property only, not to a power of appointment, and he argues that the exercise of the power created property, but inasmuch as the property was not created during the coverture it is outside the operation of the covenant.

Mr. Mathew, on the other hand, puts it in this way—that the interest of Mrs. Tremayne in default of appointment was already caught by the covenant, and she could not by any subsequent appointment disturb that state of things or defeat her own covenant—and he referred to the case of *Attorney-General* v. *Earl of Selborne* (2) in support of that proposition.

Lest I should forget to make the observation later, I may here point out that the settlement I have to construe is a voluntary one and not made for valuable consideration. That, of course, does not affect the construction of the document; it only precludes any such argument as was put forward in one of the cases I am about to deal with, that the appointment was in breach of a contract made for valuable consideration.

In the course of the arguments addressed to me five cases were pressed upon me. They were *Townshend* v. *Harrowby* (3), *Bower* v. *Smith* (4), *Steward* v. *Poppleton* (5), *In re Lord Gerard* (6), and

(1) 17 Q. B. D. 536.
(2) [1902] 1 K. B. 388, 398.
(3) 27 L. J. (Ch.) 553; 4 Jur. (N.S.) 353.
(4) L. R. 11 Eq. 279; 19 W. R. 399.
(5) [1877] W. N. 29.
(6) 58 L. T. 800.

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In re O'Connell. (1) Of these Mr. Russell claims that *Townshend* v. *Harrowby* (2), *Bower* v. *Smith* (3), and *In re Lord Gerard* (4) are all in his favour, and he suggests that *Steward* v. *Poppleton* (5) throws no light on the subject.

Mr. Mathew, on the other hand, claims that *Steward* v. *Poppleton* (5) and *In re O'Connell* (1) are both in his favour.

I do not think I ought to rely on the authority of *Bower* v. *Smith* (3). The case was admittedly not argued, and in one very essential point it differed from the one I am now considering in that the gift over in default of appointment was to a stranger. I therefore eliminate that case. Further, I do not think that *Steward* v. *Poppleton* (5) affords me any assistance. In that case there was an absolute gift to the covenantor, and then, by way of indicating that the legatee was to have complete dominion of the subject-matter of the gift without any marital control, the testatrix added these words to the gift, "in trust for the wife absolutely," and the testatrix declared "that the share of the wife should be for her separate use, free from marital control, and should be subject to her appointment by deed or will notwithstanding coverture."

Eliminating these two cases, it leaves three with which I have to deal. Of these three, two—*Townshend* v. *Harrowby* (2) and *In re Lord Gerard* (4)—are in Mr. Russell's favour; the remaining one—*In re O'Connell* (1)—supports Mr. Mathew's contention. *Townshend* v. *Harrowby* (2) is a decision of Kindersley V.-C., *In re Lord Gerard* (4) of North J., and *In re O'Connell* (1) of Kekewich J.; and in giving his judgment the last-named seems to have appreciated that he was differing from the other two. Under these circumstances I have to decide which of the two sets of authorities I ought to treat as applicable to this case.

In *In re Lord Gerard* (4) North J. purported to follow *Bower* v. *Smith* (3), and in *In re O'Connell* (1) Kekewich J. stated in terms that he was following *Steward* v. *Poppleton.* (5) If the view which I have expressed as to the weight and applicability of *Bower* v. *Smith* (3) and *Steward* v. *Poppleton* (5) is right, I may perhaps

(1) [1903] 2 Ch. 574.
(2) 27 L. J. (Ch.) 553; 4 Jur. (N.S.) 353.
(3) L. R. 11 Eq. 279; 19 W. R. 399.
(4) 58 L. T. 800.
(5) [1877] W. N. 29.

set off *In re Lord Gerard* (1) against *In re O'Connell* (2), and this would leave *Townshend* v. *Harrowby* (3) as the sole survivor of the five cases I have enumerated.

In that case there was first a general power of appointment given to the lady, then a life interest to her, and then a gift over in default of appointment to her executors. The Vice-Chancellor held that the interest in default of appointment would be bound by the covenant, but he further held that the lady might at any time exercise the power "uncontrolled by the covenant in the settlement."

It seems to me that, if that judgment is right, *In re O'Connell* (2) is wrong. Indeed Kekewich J. says as much himself, for just before expressing the opinion that it is his duty to follow *Steward* v. *Poppleton* (4) he remarks: "It seems to me that if *Steward* v. *Poppleton* (4) is sound, *Townshend* v. *Harrowby* (3) was wrongly decided."

With great diffidence I respectfully doubt if there is such inconsistency between *Steward* v. *Poppleton* (4) and *Townshend* v. *Harrowby* (3) as the learned Judge seemed to think there is; but there is undoubtedly a difference in the result arrived at in *Townshend* v. *Harrowby* (3) and in *In re O'Connell* (2), and, upon the best consideration which I have been able to give to the matter, I prefer the earlier authority, which appears to me to give proper weight to the distinction between power and property, and I therefore hold that the fund in this case is not caught by the covenant in the settlement of March 26, 1902.

Jan. 30. The question relating to the bonus of 241*l.* 4*s.* now came on for argument and determination.

Hon. Frank Russell, for the applicant. I submit that there is no right to the bonus under s. 48, sub-s. 1, of the Irish Land Act, 1903, unless and until it is allocated. The coverture determined on June 9, 1904, the date of the decree nisi—*Prole* v. *Soady* (5); *Allcard* v. *Walker* (6)—and during it there never was any bonus

(1) 58 L. T. 800.
(2) [1903] 2 Ch. 574, 582.
(3) 27 L. J. (Ch.) 553; 5 Jur. (N.S.) 353.
(4) [1877] W. N. 29.
(5) (1868) L. R. 3 Ch. 220.
(6) [1896] 2 Ch. 369.

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in existence. Under the Act of 1903 alone, the tenant for life was merely trustee of the bonus—*In re Marquis of Ely's Estate* (1)—so that until the Irish Land Act, 1904, was passed, making the bonus the tenant for life's own proper moneys, the applicant, on a sale, would have had only a life interest in the bonus, and a life interest is expressly excepted from the scope of this covenant. Then the Act of 1904 was passed and came into operation on August 15, 1904, two months after the marriage was dissolved, and I submit that it only relates to sales in future, and does not affect the case of a settlement where the marriage has been dissolved before the commencement of the Act, and does not operate retrospectively to bring the bonus within the covenant.

In *In re Power's Estate* (2), where the covenant to settle after acquired property expressly excepted the real and personal property not thereinbefore settled, Wylie J., notwithstanding that the bonus appeared on the final schedule as payable to the trustees of the settlement, held that the bonus was not captured by the covenant and was payable to the tenant for life's mortgagees. Further, I submit that this bonus is a by-product forming part of her life interest in the Garracloon Estate. Her life interest is excepted from the settlement and is to be held in trust for her absolutely. The applicant is, therefore, also entitled absolutely to this bonus as a by-product of her life interest: *In re Lady Annaly's Trusts* (3), where certain real estate in Ireland was excepted from the operation of a covenant to settle after acquired property, and Kekewich J. held that the bonus payable on a sale of the Irish land belonged to the tenant for life as a by-product of the sale and was not caught by the covenant.

C. J. Mathew, for the respondent trustees. The money has been paid out to the trustees under an order of the Irish Court, and I submit that this Court has no jurisdiction to alter the effect of that order.

[EVE J. I have jurisdiction to answer the second question raised by the summons.]

The bonus is an estate or interest in the land—*In re Lady*

(1) [1904] 1 I. R. 66. (2) [1907] 1 I. R. 51; 41 Ir. L. T. R. 13, 14.
(3) 92 L. T. 13; 53 W. R. 150.

Annaly's Trusts (1); *In re Power's Estate* (2)—and, therefore, as soon as the Irish Land Act, 1903, came into force, the applicant, during the coverture, became entitled in respect of this bonus to a contingent estate or interest in the land, which was caught by this covenant, if not by the conveyance in the settlement, and to which on a sale she, as tenant for life, by virtue of the Act of 1904, was absolutely entitled.

The bonus is a by-product, not of her life estate so as to be excepted from the settlement, but of the whole estate in the settled land, and belongs to her as vendor thereof, and is subject to and captured by the covenant in question.

Hon. Frank Russell in reply.

Cur. adv. vult.

Feb. 4. EVE J., after referring to the voluntary settlement of March 26, 1902, and to the conveyance of the applicant's interest in the Garracloon property therein contained, continued :— On November 1, 1903, the Irish Land Act, 1903, came into operation. Its main object was to facilitate by the means thereby provided the purchase by Irish tenants of the lands in their occupation, and, in order to encourage landowners to meet the tenants, a fund was thereby provided out of which the vendor of each estate sold under the Act may be paid a sum calculated at the rate of 12 per cent. on the amount of the purchase-money advanced under the Land Purchase Acts. This sum, which is referred to as a percentage in s. 17 of the Act, is popularly known as the " bonus," and as such I shall refer to it hereafter.

In *In re Marquis of Ely's Estate* (3) Ross J. decided that, in cases where the sale was effected by a tenant for life as vendor, the tenant for life was not entitled to retain the bonus for his own use, but was bound to account for it to the trustees of the settlement as representing part of the proceeds of sale of the settled land.

Consequent upon this decision the Irish Land Act, 1904, was passed, and the material provisions on the question now under consideration are to be found in s. 3, sub-s. 1, and s. 4. [His

(1) 92 L. T. 13; 53 W. R. 150.

(2) [1907] 1 I. R. 51; 41 Ir. L. T. R. 13, 14.

(3) [1904] 1 I. R. 66.

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Lordship read s. 3, sub-s. 1, and s. 4, and continued:—] By virtue of an order of the Divorce Court made on December 19, 1904, Mrs. Tremayne's marriage was dissolved as from June 9, 1904—*Prole* v. *Soady* (1); *Allcard* v. *Walker* (2)—and subsequently to such dissolution she effected sales of the Garracloon Estate under the Act of 1903 at prices which reached a total of 2010*l.*, and which resulted in a bonus of 241*l.* 4*s.* being payable under the provisions of the two Land Acts to which I have drawn attention.

The question I have to determine is whether this bonus belongs to Mrs. Tremayne or ought to be retained by the trustees of the settlement of March 26, 1902, to whom in fact it has been paid under an order of the Court of the Irish Land Commission dated August 1, 1906.

Mr. Russell, on behalf of Mrs. Tremayne, has argued that inasmuch as her interest in the Garracloon Estate was in July, 1902, determined to be a life interest, and was therefore under the trusts of the settlement to be held upon trust for her absolutely, this bonus, payable to her by virtue of being tenant for life under the statute of 1904, must or ought to follow or be attached to the life interest and so be treated as held in trust for Mrs. Tremayne absolutely. It seems to me, however, that I am precluded from adopting this view of the bonus by two decisions which have already attached to it characteristics of a different nature.

In *In re Lady Annaly's Trust* (3) the late Kekewich J. had to decide in terms whether the bonus was an estate or interest in the land upon the sale of which it became payable, and he says (4): "Is it an estate or interest in that land? It is very difficult to decide. It is not an estate, of course, in the strict sense of the word. But is it an interest? It is derived from the land. It is paid by the State out of a fund provided for the purpose. It is never repaid, and there is no liability upon anybody to repay it. It is a gift from the State to the vendor, so that it cannot be said to come out of the land, and of course strictly it is not an interest in the land in the ordinary sense. Supposing a question arose

(1) L. R. 3 Ch. 220.
(2) [1896] 2 Ch. 369.
(3) 92 L. T. 13; 53 W. R. 150.
(4) 92 L. T. 17.

respecting the purchase-money, it appears that this lady would be a necessary party to the litigation, as being a person interested in the sale of the land. So in that sense it is an interest in the land. But I must give it some meaning. I must find out what is its connection with the land. If it is an estate or interest, it must fall within the covenant. I am much assisted here by the judgment of Ross J. He was dealing with the question whether the vendor, the tenant for life, could take this money for himself. He is reported to have said on p. 85: 'It is contended for the Marquis that the bonus is a gift from the gods, and comes to the tenant for life as a persona designata. I cannot agree. It comes to the tenant for life because he sells. It comes to him because he sells so much land as the Estates Commissioners may declare fit to be regarded as a separate estate. It is impossible to deny that the bonus affects the price. The tenant buys at a lower price because the vendor gets the bonus. The estate loses, or is exposed to the risk of loss, in order that the man whose duty it is to represent it and defend it may take a benefit.' The learned judge knew it came from the State, but if it did not come from the State it came from the land; therefore he says: 'I cannot agree that it is a gift from the gods. It comes from the tenant for life because he sells.' It makes the sale of the life estate go easily. Then on p. 86 the learned judge says, as reported: 'With respect to the bonus, I am now of opinion, having regard to the nature and the circumstances under which it is acquired, that a Court of Equity ought not to allow the tenant for life to appropriate this by-product of the sale to his own use. It must fasten a trust upon it in his hands, and compel him to hold it for all other parties who take under the settlement, as well as for himself.' I repeat that is not binding on me, although I turn to it with great advantage. But it is an authority on the question as to whether the tenant for life held as a trustee for the settlement before the Act of 1904. Therefore the judgment is of very great value apart from other considerations. If, therefore, Lady Annaly had sold before 1904 and received the 40,845*l.*, she would have been bound to account for it to the estate. Why? Because she gets it as part of, or connected with, the sale of the

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estate, because she gets something which has probably come off the value of the estate. In one word, it is a 'by-product' of the sale. If that reasoning is correct, as I suppose it to be, the result is that she could not get the money without selling the estate; but she really gets it as a 'by-product' of the estate. That being so, she gets it as something which she gets by reason of her limited ownership of the property—something so closely connected with the land that I must regard it as an interest in these hereditaments; it is not affected in consequence by the covenant, and I make a declaration that it is not caught by the covenant to settle after acquired property."

The second case is an Irish case, *In re Power's Estate* (1), and there Wylie J., in following Kekewich J., says: "Mr. Justice Ross in *Ely's Estate* (2) and Mr. Justice Kekewich in *Annaly's Estate* (3) both held that the bonus was an estate or interest in the settled land, and was, apart from the Act of 1904, captured by and subject to the trusts of the settled land."

Such being the nature of the bonus, it is impossible for me to treat it as an incident or by-product of the life estate. It is, in fact, according to these authorities, an interest in the settled hereditaments, and an interest to which the tenant for life, Mrs. Tremayne, became entitled, or which accrued to her, when the Act of 1903 interpreted by the Act of 1904 came into force on November 1, 1903.

This was during her coverture, and the covenant to settle after acquired property in the settlement of March 26, 1902, is, so far as is material, in the following terms: [His Lordship read the covenant as above set out, and continued:—]

Having regard to the terms of that covenant and to the true nature of the bonus, as determined by the authorities I have cited, I am bound to hold that the 241*l.* 4*s.* is caught by the covenant and ought to be retained by the trustees of the settlement upon the trusts therein declared of and concerning the other and after-acquired property of the settlor, and I so decide.

Solicitors: *Charles Russell & Co.*

(1) [1907] 1 I. R. 51, 54. (2) [1904] 1 I. R. 66.
(3) 92 L. T. 13; 53 W. R. 150.

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Feb. 25, 26, 27; *March* 11.

[1906 M. 3333.]

Landlord and Tenant—Quiet Enjoyment—Implied Contract—Extent—Agreement to "let"—Disturbance—Persons claiming through Landlord—Prior Mining Lessees—Covenant with Landlord's Trustees to indemnify Landlord—Disturbance induced by Landlord—Derogation from Grant—Action by Tenant—Third Party Notice by Landlord for Indemnity—Rules of the Supreme Court, 1883, *Order* XVI. *r.* 48.

By an agreement of August 15, 1895, Joseph Paget, the owner of Stuffynwood Hall, Derby, and the owners of adjoining property agreed to let the underlying minerals to a mining company, together with the usual powers of working.

The agreement, construed by the light of *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, 313, did not empower the company to let down the surface, and such a power was not a usual clause in the district.

Joseph Paget died in 1896, having appointed the defendant and others his executors and trustees, and having devised his real estate to the use of his trustees in trust for the defendant, his wife, for life.

On December 31, 1901, the Paget trustees (including the defendant) and the adjoining owners carried out the agreement of 1895 by two contemporaneous leases, namely, (*a*) a trust lease for a long term granted by the Paget trustees and the adjoining owners to certain "demising trustees" on trust to grant a specified mining lease to the company; (*b*) the mining lease by the demising trustees to the company.

The mining lease empowered the company to let down the surface, but there was a provision that, in case serious damage by subsidence was reasonably anticipated, the company might, without paying for the same, leave sufficient coal as should be agreed upon by the demising trustees for support.

The company covenanted with the demising trustees to indemnify the owners against damage caused by their workings, and to indemnify the owners and the demising trustees against actions in respect of damage arising from the exercise of their powers.

By a tenancy agreement of December 31, 1904, the defendant "agrees to let" Stuffynwood Hall to the plaintiff. She excepted and reserved the minerals with full power to work them, but she did not reserve power to let down the surface, nor was the agreement made subject to the trust and mining leases.

Serious damage to Stuffynwood Hall being subsequently anticipated,

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the defendant influenced the demising trustees to refuse to agree to any coal being left for support without payment.

The coal was therefore worked, subsidence resulted, and the plaintiff suffered serious consequential damage.

The plaintiff sued the defendant for damages for derogation from her grant and for breach of the contract for quiet enjoyment implied by the word "let." The defendant, who denied the derogation, and said that no contract was implied, claimed indemnity against the company by third party notice under Order XVI. r. 48 :—

Held, that the plaintiff was entitled to damages on both the above grounds, as—

(*a*) The defendant's conduct amounted to derogation from her grant;

(*b*) A contract for quiet enjoyment without interruption by the defendant, or any one claiming through her, was implied by the word "let";

(*c*) The company claimed through the defendant and the other Paget trustees, and not merely through their testator.

Hurd v. *Fletcher*, (1778) 1 Doug. 43, applied.

Held, also, that the company's covenant for indemnity did not extend to a liability arising directly from the defendant's conduct, and that in any case the defendant, not being a covenantee, could not enforce the indemnity by third party notice.

Review of the authorities on "implied contract for quiet enjoyment" from *Hart* v. *Windsor*, (1843) 12 M. & W. 68, to *Jones* v. *Lavington*, [1903] 1 K. B. 253.

Semble, prior to *Jones* v. *Lavington*, [1903] 1 K. B. 253, the implied contract, though limited in duration by the lessor's estate, extended to a lawful interruption by title paramount during the continuance of that estate.

Baynes & Co. v. *Lloyd & Sons*, [1895] 1 Q. B. 820, 826; [1895] 2 Q. B. 610, 615, 616, explained.

WITNESS ACTION.

By an agreement dated August 15, 1895, Joseph Paget, the owner of Stuffynwood Hall, Derby, and 250 acres of minerals thereunder and adjoining, and the owners of 750 acres of adjoining minerals agreed to let the Top Hard Seam of coal in 1000 acres to an intended company, registered the next day as the Shirebrook Colliery, Limited.

The terms of the lease were to be to the effect set forth in the first schedule, subject to such modification as might be agreed upon, and all usual powers for winning and working the said seam were to be granted to the company.

The first schedule provided that the lease was to be for eighty years from September 1, 1895, at the rents and royalties therein mentioned.

Clause 5 provided that the company were to covenant—"(*a*) to win and work vigorously . . . . (*c*) to pay for all coal improperly lost or abandoned; (*e*) to indemnify the lessors or other the surface owners for the time being from and against all damage to the existing and future buildings and surface works on the lands overlying the minerals demised by subsidence or otherwise caused by the company's workings, but so that in case serious damage by subsidence is anticipated the company shall have the power without paying for the same to leave sufficient coal for the support of the buildings and surface works and so that they shall also have access at reasonable times to the buildings and other surface works in order to make good or provide against any damage that may have been done or protect from damage that may be anticipated."

Clause 9, entitled "Usual clauses," provided that "The lease shall contain all other clauses and conditions consistent with the terms of the above agreement usual in similar leases in the counties of Derby and Nottingham the same in case of dispute being settled by arbitration. . . . ."

Joseph Paget died on October 21, 1896, having by his will and codicils appointed Currey, Need, and the defendant, hereinafter called the Paget trustees, his executors and trustees, and having devised his real estate, including Stuffynwood Hall and the minerals, unto and to the use of the trustees in trust for his wife the defendant for life. The will and codicils contained no power to grant mining leases.

By a trust lease dated December 31, 1901, supplemental to the agreement of August 15, 1895, and made between the Paget trustees (including the defendant), the other owners, the company, and Currey and two other trustees, called "the demising trustees," the Paget trustees and the other owners, "as beneficial owners trustees or mortgagees as the case may be and according to the capacity in which they respectively are made parties . . . . and so far only as he or she respectively lawfully can or may and not further or otherwise," demised the coal to the demising trustees with liberty, "so far as the owners respectively have power to grant this liberty," to work the coal "without leaving any support for any of the scheduled lands or

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any buildings or erections thereon," to hold the demised premises to the demising trustees for the term of 500 years from September 1, 1895, upon trust, and with full power to grant the company the eighty years' lease of even date already prepared and next stated. The demising trustees were to divide the net rents and royalties between the owners in proportion to the respective areas of their lands.

By a mining lease dated December 31, 1901, and made between the demising trustees of the one part and the company of the other part, the demising trustees demised the coal to the company with liberty to work the coal "without leaving any support for any of the scheduled lands or any buildings or erections thereon," but reserving unto the persons respectively entitled to the scheduled lands, and to the mines and minerals thereunder, "so much (if any) of the said seam hereby demised as shall be necessary to be left for boundary barriers and pillars under buildings or other surface works as the (demising) trustees or their mining engineer shall subject to the provisions for arbitration hereinafter contained in writing require to be left for any of the purposes aforesaid." To hold unto the company for eighty years from September 1, 1895, at the rents and royalties thereby reserved.

It was provided that "no deduction or abatement shall be made for or on account of any ribs pillars walls or ranges which may be left in the mines otherwise than as may be required to be left pursuant to these presents but all such ribs pillars walls or ranges other than as aforesaid shall be paid for in like manner as if the coal constituting the same had been actually gotten or worked."

The company covenanted with the demising trustees to pay the rents and to win and work vigorously "according to the most approved practice of mining in the district," and to "pay for all coal improperly lost or abandoned and for all ribs pillars walls and ranges which may be left in the mine otherwise than as may be required to be left pursuant to these presents in like manner as if the coal constituting the same had been actually gotten or worked," and to "leave ungotten such permanent barriers for the proper protection of the colliery and such pillars

of coal for the support of any building or other surface works as the (demising) trustees or their mining engineer shall subject to the provisions for arbitration hereinafter contained in writing direct," and to "indemnify or pay compensation to the owners for the time being of the scheduled lands respectively or to their respective tenants from and against or in respect of all damage to the existing and future buildings and surface works on the scheduled lands or any of them respectively by subsidence or otherwise caused by the company's workings, but so that in case serious damage by subsidence is reasonably anticipated the company shall have the power without paying for the same and after giving notice in writing to the (demising) trustees their engineer or agent to leave sufficient coal as shall be agreed upon by them or him for the support of the buildings and surface works and so that the company shall also have access at reasonable times to the buildings and other surface works in order to make good or provide against any damage that may have been done or protect from damage that may be anticipated," and to "keep the owners for the time being and the (demising) trustees indemnified against all actions proceedings claims and demands in respect of any such injury or damage or any other loss, costs, damages or liability arising from the exercise of the powers hereby granted."

The arbitration clause provided that "if any dispute question or difference shall arise between the (demising) trustees and the company touching these presents or any clause or thing herein contained, or the construction hereof, or any matter in any way connected with these presents or the operation hereof or the rights duties or liabilities of either party in connection with the premises then and in every or any such case the matter in difference shall be referred to two arbitrators one to be appointed by each party and these presents shall be deemed to be a submission to arbitration within the Arbitration Act 1889 or any then subsisting modification thereof."

By a tenancy agreement dated December 31, 1904, and made between the defendant of the one part and the plaintiff of the other part, the defendant "agrees to let" Stuffynwood Hall to the plaintiff for one year from August 1, 1905, and so on from year

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to year, at a rent of 318*l.*, the defendant excepting and reserving "all mines and minerals lying in and under the said hereditaments and premises and full power to search for get and carry away the same." The plaintiff agreed to keep the inside of the mansion-house, the gas engine, the fixtures, the inside of the vineries and glasshouses, the hydraulic ram, and the carriage drive in repair, and to properly tend, cultivate, prune, clean, and preserve the vines and other fruit and ornamental trees, and to protect the trees and shrubs growing upon any part of the hereditaments from injury.

The agreement was determinable by either party on the 1st day of August, 1906, or any subsequent year, upon six months' notice in writing.

The agreement did not reserve power to let down the surface, and the plaintiff was not informed that the company had been previously granted power to do so.

At the date of the agreement the plaintiff was in occupation of Stuffynwood Hall under a seven years' lease, expiring August 1, 1905. This lease also reserved the mines and minerals and power to get the same, but no power to let down.

In the meantime the colliery workings had been approaching Stuffynwood Hall, and in November, 1904, the question as to what sized pillar ought to be left arose. A voluminous correspondence from November 21, 1904, to November 22, 1905, ensued between Hewitt (who was the mining engineer for the defendant and the demising trustees), Currey (who was a Paget trustee, a demising trustee, and who was acting as the defendant's solicitor), and the company.

In the view of the Court the correspondence and evidence clearly established that the company wished to leave a definite sized pillar unworked, and gave formal notice to that effect on May 3, 1905; that the demising trustees and the defendant and their mining engineer knew that a case for leaving support had arisen, and that unless it were left "serious damage by subsidence was reasonably anticipated," and therefore that it was the duty of the demising trustees under the mining lease of 1901 to agree that sufficient coal for that purpose should be left without requiring the company to pay for it but that, at the instance of

the defendant, who wished the coal to be worked, and upon whose instructions Currey, one of the demising trustees, certainly acted, the demising trustees withheld their consent, and left the company to take their own course, pointing out that their safest plan was to go on working. The company, being thus left to take their own course, worked out the coal.

Very serious subsidences ensued from time to time, and in spite of the efforts of the company to repair the damage the premises were rendered absolutely uninhabitable for periods amounting to fifteen months out of the two years' tenancy. In March, 1906, the plaintiff expressed his desire to terminate the tenancy on July 31, 1906, the end of the first year, but the defendant refused to release him. He finally had to leave and remove his furniture in October, 1906, but the tenancy was not determined till July 31, 1907. The plaintiff was therefore compelled to pay the rent, and also to keep up the garden and grounds at an expense of 400*l.* a year, to the end of the two years' tenancy, though he lost the produce of the glasshouses, the coal for which cost 60*l.* a year, and a large portion of the garden expenses was no benefit to him. He also incurred expenses for papering, painting, caretaker's wages, removing and warehousing his furniture, and extra travelling expenses, and the evidence shewed that he had suffered damage to the amount of 700*l.*

The plaintiff brought this action for damages against the defendant. He based his claim on two grounds—(*a*) that her conduct amounted to a derogation from her grant; and (*b*) that there had been a breach of the implied contract for quiet enjoyment.

The defendant denied the derogation, and did not admit that any contract for quiet enjoyment was implied.

The defendant issued a third party notice against the company, claiming indemnity.

The company stated that they had made good all damage to the buildings and surface works that had already occurred, and were ready to make good future damage, but submitted that under the circumstances their covenant for indemnity did not cover the consequential damage which the plaintiff had suffered by their workings. They also objected that the defendant was

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not entitled to enforce the covenant, which was entered into with the demising trustees.

Hon. E. C. Macnaghten, K.C., and *MacSwinney*, for the plaintiff. The right to let down the surface was not implied by Joseph Paget's agreement of 1895. In the first place, a clause giving such a right was not a "usual clause" in the district. Indeed, it was rarely inserted in any district: Key and Elphinstone's Precedents, 6th ed., vol. i. p. 803.

Secondly, the fact that power to work by the long-wall system, with the consequent subsidence, was implied did not give a right to let down: *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (1) The right was therefore first conferred, not by Joseph Paget, but by the defendant and the other Paget trustees in the trust and mining leases of 1901. It could no doubt have been validly granted by the defendant as life tenant under the Settled Land Acts: *Sitwell* v. *Earl of Londesborough.* (2) In any case the defendant was one of the parties to and responsible for those leases, and the company claim through her, in whatever capacity she joined: *Hurd* v. *Fletcher* (3); *Calvert* v. *Sebright.* (4)

Now the consent of the demising trustees to the pillar being left was refused at the instance of the defendant. That is a derogation from her grant to the plaintiff, and she is responsible in damages: *Grosvenor Hotel Co.* v. *Hamilton.* (5)

She is also liable on the contract for quiet enjoyment implied by the word "let." The words "demise, grant, &c." clearly imply such a contract or covenant: *Nokes's Case* (6); and so does the word "let" or other similar words: *Hart* v. *Windsor* (7); *Bandy* v. *Cartwright* (8); *Hall* v. *City of London Brewery Co.* (9); *Mostyn* v. *West Mostyn Coal and Iron Co.* (10); *Robinson* v. *Kilvert.* (11) The covenant, if implied, does not last beyond the estate of the

(1) [1906] A. C. 305, 313.
(2) [1905] 1 Ch. 460.
(3) 1 Doug. 43.
(4) (1852) 15 Beav. 156.
(5) [1894] 2 Q. B. 836.
(6) (1599) 4 Rep. 80b.
(7) 12 M. & W. 68, 85.
(8) (1853) 8 Ex. 913, 919; 22 L. J. (Ex.) 285.
(9) (1862) 2 B. & S. 737, 741, 742.
(10) (1876) 1 C. P. D. 145, 152, 154.
(11) (1889) 41 Ch. D. 88, 96.

lessor: *Baynes & Co.* v. *Lloyd & Sons.* (1) In that case the lessor's estate had ceased at the time of the eviction, so that it was unnecessary to decide whether the covenant was implied by the word "let." Lord Russell of Killowen in the Court below thought it was implied. The Court of Appeal thought the weight of authority was the other way. But they did not decide it, and their opinion was treated as merely a dictum in *Budd-Scott* v. *Daniell* (2), where the Divisional Court held that an undertaking for quiet enjoyment was implied from the mere relation of landlord and tenant. In *Jones* v. *Lavington* (3) the Court of Appeal left the particular point open, and merely held that the covenant, if implied, would not extend to lawful eviction by title paramount. That does not arise here, as the company claim under the defendant.

Hon. Frank Russell, K.C., and *John Dixon*, for the defendant. The clause giving power to work without leaving support was a "usual clause." It came into very frequent use after the decision in *Davis* v. *Treharne.* (4) The note in Key and Elphinstone's Precedents, 6th ed. vol. i. p. 803, is not well founded. In any case Joseph Paget's agreement of 1895 must have contemplated working by the long-wall system, the usual system in the district. This involves a subsidence to the extent of two-thirds of the thickness of coal worked. Power to work without leaving support is therefore implied. *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (5) does not apply to the case of an executory agreement, and it was necessary and proper for the Paget trustees, in granting the trust and mining leases in accordance with their testator's agreement, to insert the power to let down the surface.

In granting the leases they were only acting ministerially, and the company really claim under their testator, Joseph Paget, and not under the Paget trustees or the defendant.

In *Hurd* v. *Fletcher* (6) and *Calvert* v. *Sebright* (7) the lessee was evicted by a prior appointee claiming under the joint

(1) [1895] 1 Q. B. 820, 826; [1895] 2 Q. B. 610, 615, 616.
(2) [1902] 2 K. B. 351, 356, 358, 361.
(3) [1903] 1 K. B. 253; 72 L. J. (K.B.) 98, 100.
(4) (1881) 6 App. Cas. 460.
(5) [1906] A. C. 305, 313.
(6) 1 Doug. 43
(7) 15 Beav. 156.

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appointment of the lessor and another person. It was naturally held that the appointee claimed under both appointors. That is a very different thing from saying that where a lease is granted by trustees in pursuance of their testator's contract the lessee claims under the trustees individually, and not under their testator.

Even if the defendant is one of the parties responsible for the mining lease, it is no derogation from her subsequent grant to the plaintiff. It is merely a case of imperfect title, not of derogation. It is said that her subsequent conduct amounted to derogation. But what was the position? The demising trustees, not the defendant, might have agreed to have the pillar left without payment. But they were not bound to agree. Failing agreement the company could have left the pillar at the risk of having to pay for it, if improperly abandoned. That would have been a question for arbitration under the very wide arbitration clause, and would have arisen when they were called upon to pay for the pillar. The demising trustees could no doubt have stopped the pillar being worked, but their mere abstention to do so, even if it was at the defendant's instance, was no derogation from her grant to the plaintiff: *Master* v. *Hansard.* (1) The case on derogation therefore fails.

The plaintiff also relies on an implied contract for quiet enjoyment. The words "demise, grant, &c." no doubt imply such a contract or covenant: *Nokes's Case* (2); but it is not at all clear that the word "let" does so. The dictum of Parke B. in *Hart* v. *Windsor* (3) was founded on a misapprehension of Sheppard's Touchstone, 7th ed. pp. 165, 167, 272. In *Bandy* v. *Cartwright* (4) there was an "instrument of demise," and possibly the word "demise" was used. *Hall* v. *City of London Brewery Co.* (5) merely followed *Bandy* v. *Cartwright* (4), though no doubt Cockburn C.J. approved of the decision.

Mostyn v. *West Mostyn Coal and Iron Co.* (6) merely treated the dictum in *Hart* v. *Windsor* (3) as an authority, and in

(1) (1876) 4 Ch. D. 718, 722.
(2) 4 Rep. 80b.
(3) 12 M. & W. 68, 85.
(4) 8 Ex. 913, 919; 22 L. J. (Ex.) 285.
(5) 2 B. & S. 737, 741, 742.
(6) 1 C. P. D. 145, 152, 154.

Robinson v. *Kilvert* (1) the general point was assumed without argument, the actual question being whether a special covenant for the needs of a particular business was implied. In other words, the decision was as to the scope, and not as to the existence of the covenant.

In *Baynes & Co.* v. *Lloyd & Sons* (2) the Court of Appeal differed from the dictum of Lord Russell of Killowen C.J. in the Court below, and thought that the contract or covenant was only implied by the words "demise, grant, &c." It is true their own remarks were, strictly speaking, only dicta, but they were considered dicta in the joint written judgment of Lord Esher M.R. and Kay and A. L. Smith L.JJ. They are entitled to very great weight, and they shew that Lord Esher M.R. had receded from his former view in *Mostyn* v. *West Mostyn Coal and Iron Co.* (3) These considered dicta of the Court of Appeal ought not to be overweighed by the judgment of the Divisional Court in *Budd-Scott* v. *Daniell.* (4)

In *Jones* v. *Lavington* (5) the Court of Appeal, while deciding that the covenant, if implied, would not extend to a lawful interruption by title paramount, left open the question whether any covenant was implied. They evidently did not consider the point settled by *Budd-Scott* v. *Daniell* (4), and attached the greatest weight to the views of the Court of Appeal in *Baynes & Co.* v. *Lloyd & Sons* (2), refusing to reopen their considered opinion on the paramount title point, an opinion based on *Andrews' Case.* (6) This is rendered doubly clear by the interlocutory observations in the *Law Journal* report.

It is generally considered that *Budd-Scott* v. *Daniell* (4) is no longer law: Woodfall on Landlord and Tenant, 18th ed. pp. 776, 778. The true view, therefore, is that the covenant for quiet enjoyment is not implied by the word "let," and in any case, if it is implied, it does not extend to lawful interruption by title paramount, which is the case here.

(1) 41 Ch. D. 88, 96.
(2) [1895] 1 Q. B. 820, 826; [1895] 2 Q. B. 610, 615, 616.
(3) 1 C. P. D. 145, 152, 154.
(4) [1902] 2 K. B. 351, 356, 358, 361.
(5) [1903] 1 K. B. 253; 72 L. J. (K.B.) 98, 100.
(6) (1590) 2 Leon. 104; Cro. Eliz. 214.

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Hon. E. C. Macnaghten, K.C., in reply. *Master* v. *Hansard* (1) only decided that the mere abstention of a common lessor to take active steps to prevent the lessee of plot A interfering with the subsequent lessee of plot B by obstructing his lights was not derogation, though if the lessor had obstructed them himself it would have been derogation. In the present case the pillar was worked out at the instance of the defendant, the common lessor. That is a clear derogation from her grant to the plaintiff.

The third party notice was then opened.

Hon. Frank Russell, K.C., and *John Dixon*, for the defendant. The company covenanted to indemnify the owners against all damage to the buildings caused by their workings. They also covenanted to keep the owners and the demising trustees indemnified against all actions, proceedings, claims and demands in respect of any such damage, or any other loss, costs, damages or liability arising from the exercise of their powers. This indemnity is wide enough to include the present claim.

Micklem, K.C., and *Abraham*, for the company. The claim does not really arise from the exercise of the company's powers. It is caused by the defendant's own act in granting the plaintiff an unconditional tenancy, with an implied easement of support, instead of a tenancy subject to the company's lease. The defendant was not entitled to increase the burden of the indemnity in this way.

Secondly, the damage was caused by the defendant's refusal to have the pillar left.

Thirdly, the defendant cannot enforce the covenant for indemnity which is entered into with the demising trustees, who were not, and could not be, brought in by the third party notice. Even if this technical defect were waived, the defendant would have no higher rights than the demising trustees, who certainly refused to have the pillar left.

Hon. Frank Russell, K.C., in reply. The covenant, though made with the demising trustees, is a covenant to indemnify the owners

(1) 4 Ch. D. 718, 722.

direct. If the defendant were suing on the covenant by original action, she would no doubt have to sue through the trustees or join them as defendants. But the third party procedure, Order XVI., r. 48, which was intended to prevent multiplicity of actions, makes no provision for joining persons other than the persons against whom the indemnity is claimed. The rule provides that "where a defendant claims to be entitled to contribution, or indemnity over against any person not a party to the action" he may by leave issue a third party notice to that effect. "The notice shall state the nature and grounds of the claim." The terms of this rule are wide enough to allow the Court to waive the technical necessity of making the demising trustees parties, particularly when they have no interest in the question. As the trustees would be mere formal parties, and the covenant is to indemnify the defendant directly, the equities, if any, against the trustees would not be available against the defendant.

Cur. adv. vult.

March 11. SWINFEN EADY J. The plaintiff by an agreement in writing agreed to rent Stuffynwood Hall, Derby, of the defendant for one year, from August 1, 1905, and so on from year to year until determined by six months' notice, at an annual rent of 318*l.* The defendant excepted the minerals, with power to work them, but without any power to let down the surface. The premises included extensive grounds, shrubberies, and gardens, with numerous glasshouses, and a small park. The coal under part of the premises has been worked by the Shirebrook Colliery, Limited. The result has been to render the premises uninhabitable. [His Lordship then stated details of the subsidence and of the consequential damage and loss to which the plaintiff was put, and continued:—]

I assess the actual pecuniary loss which the plaintiff has sustained at 700*l.* The grounds upon which the plaintiff seeks to recover this amount from the defendant are that it was an implied term of the agreement for letting that the plaintiff might quietly enjoy the premises during the term, either absolutely, or at least without interruption by the defendant or any one claiming

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through her. The plaintiff also alleges that the defendant has herself caused the damage, and has derogated from her grant, i.e., from the letting of the premises to him, by refusing to agree or to consent to the demising trustees agreeing to a pillar of coal being left to support the hall, notwithstanding a provision in that behalf contained in the mining lease to the company. In order to deal with the legal questions that arise, it is now necessary to consider the defendant's title. [His Lordship then referred to the agreement of August 15, 1895, for a lease by Joseph Paget and others to the company, and held on the evidence that the clause in the mining lease of 1901 giving the company power to work "without leaving any support" to the surface was not a "usual clause" in the district at the date of that lease, so that its insertion was not involved by the agreement. His Lordship continued:—]

It was also contended, in the alternative, that the agreement implied leave to work by the long-wall system, the usual system in the district, and as this system involves a subsidence to the extent of two-thirds of the thickness of coal worked, power to work without leaving support must be implied; but this point is covered by the observations of Lord Macnaghten in *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (1) In my opinion the agreement entered into by Joseph Paget did not confer on the company any power to work so as to let down the surface. The agreement does, however, contain a material clause to which reference ought now to be made, namely, sched. 1, clause 5 (*e*), providing that "in case serious damage by subsidence is anticipated the company shall have the power, without paying for the same, to leave sufficient coal for the support of the buildings and surface works." [His Lordship then referred to the will and death of Joseph Paget and to the trust lease and mining lease of 1901, and continued:—]

The defendant was a party to the trust lease, and thereby authorized the demising trustees to grant the mining lease in the particular form specified, for which purpose, and for which purpose alone, she concurred in demising the minerals to the demising trustees. In my opinion the company is a party deriving title

(1) [1906] A. C. 305, 313.

under the defendant as much as if she had been a party to the mining lease itself, and accordingly I decide that the company claim through or under the defendant. The defendant contended that the company claimed under Joseph Paget, and not under the defendant herself. The answer is that if the defendant had only as trustee of Joseph Paget's will granted such a lease as she could have been compelled to grant by reason of Joseph Paget's contract, the company would nevertheless have claimed under her as well as under her testator: *Hurd* v. *Fletcher*. (1) But the defendant in fact did more. She concurred in granting a lease to the company, which in clear and express terms empowered the company to work out the coal without leaving any support for any of the lands or buildings. She also concurred in a modification of the provision contained in Joseph Paget's agreement with reference to the company leaving coal without paying for it in order to support buildings and surface works. In the mining lease as executed the provision is, "In case serious damage by subsidence is reasonably anticipated, the company shall have the power without paying for the same and after giving notice in writing to the (demising) trustees their engineer or agent to leave sufficient coal as shall be agreed upon by them or him for the support of the buildings and surface works." Thus the provision in the Paget agreement enabling the company to leave coal for support without paying for it is limited in the mining lease to such coal "as shall be agreed upon by the (demising) trustees or their engineer." What actually occurred was this. [His Lordship then stated the correspondence and evidence relating to the proposed pillar, and continued:—]

The correspondence and evidence clearly establish that the company wished to leave the pillar, and gave formal notice to that effect on May 3, 1905; that the demising trustees and the defendant and their mining engineer knew that a case for leaving support had arisen, and that unless it were left "serious damage by subsidence was reasonably anticipated," and therefore that it was the duty of the demising trustees under the mining lease to agree that sufficient coal for that purpose should be left without requiring the company to pay for the same; but that at the instance

(1) 1 Doug. 43.

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of the defendant, who wished the coal to be worked, and upon whose instructions Currey, one of the demising trustees, certainly acted, the demising trustees withheld their consent and left the company to take their own course, pointing out that their safest plan was to go on working. The result was that the company were left to take their own course and worked out the coal, occasioning the damage to Stuffynwood, to which I have before referred.

In my opinion the defendant was derogating from her grant. It was not a question of merely remaining passive. The question of leaving a pillar first arose when the plaintiff was in occupation of Stuffynwood under an earlier lease, and before the tenancy agreement of December 31, 1904, was entered into, and it appears from Currey's letter of November 25, 1904, to the demising trustees' solicitors that the defendant would not consent to any pillar being left for Stuffynwood, but would require the company to work their coal. This attitude was never departed from, notwithstanding the provisions of the mining lease, and this has directly led to the damage. The coal was worked out at the instance of the defendant. The case of *Grosvenor Hotel Co.* v. *Hamilton* (1) is an authority for a person being liable in damages for the breach of an implied obligation not to derogate from his grant.

There remains the further question whether the plaintiff can recover upon an implied contract for quiet enjoyment contained in the agreement for letting the hall. It is conceded that if the word "demise" had been the operative word in the agreement there would have been an implied contract for quiet enjoyment, but it is contended that a contract will not be implied from any other words.

In *Hart* v. *Windsor* (2) Parke B., in delivering the reserved judgment of the Court of Exchequer, said: "It is clear that from the word 'demise,' in a lease under seal, the law implies a covenant, in a lease not under seal, a contract, for title to the estate merely, that is, for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term; and the word 'let,'

(1) [1894] 2 Q. B. 836. (2) 12 M. & W. 68, 85.

or any equivalent words (Shepp. Touch. 272), which constitute a lease, have, no doubt, the same effect, but not more. Shepp. Touch. 165, 167."

In *Bandy* v. *Cartwright* (1) there was a parol letting by some writing not under seal, and the tenant's quiet enjoyment was disturbed by a distress for arrears of a rent-charge lawfully claimed under a title paramount to the lessors. The language of the writing is not set out in the reports, but from the argument in the *Law Journal* it would appear that the word "demise" was not used, as counsel for the plaintiff, who was alleging an implied covenant for a good title and also for quiet enjoyment, urged that, "There is no particular virtue in the word 'demise.'" The inference rather is that the plaintiff's writing did not contain this word. In any case, however, the Court held that on an instrument of demise, not under seal, with only that contract which the law would imply, there was an implied contract for quiet enjoyment during the term, though not a covenant for title. This was followed by *Hall* v. *City of London Brewery Co.* (2) The agreement there was not under seal, and the operative words were, "The said company do hereby agree to let," and the precise point raised by the demurrer was whether upon such a contract a promise of quiet enjoyment during the term is implied in law. The Court of Queen's Bench held that it was. Cockburn C.J. said: "We cannot overrule *Bandy* v. *Cartwright* (1); and it is inconsistent with common sense that, when a man is let into possession for a year, a promise by the lessor for quiet enjoyment against himself and all that claim by title under him should not be implied." He also said that *Bandy* v. *Cartwright* (1) was a direct authority that a contract for quiet enjoyment is implied in a contract of demise, and that that case was good law. Wightman and Blackburn JJ. concurred; and Compton J., without giving any opinion of his own, said that *Bandy* v. *Cartwright* (1) was binding on that Court. Moreover, it appears from the reference during the argument to *Messent* v. *Reynolds* (3), and to the judgment of Cresswell J. in that case, that any difference between

(1) 8 Ex. 913, 919; 22 L. J. (Ex.) 285. (2) 2 B. & S. 737, 741, 742.
(3) (1846) 3 C. B. 194, 203.

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the legal effect of the word "demise" and the word "let" was a point raised and argued.

The same point was raised again in *Mostyn* v. *West Mostyn Coal and Iron Co.* (1) In that case there was a counter-claim for damages for breach of an implied covenant for quiet enjoyment. By the lease certain property was "let" to the defendants, but the point was taken that it did not appear that among the operative words the word "demise" was used. It was nevertheless held that the lessees could obtain damages for breach of an implied covenant for quiet enjoyment. Brett J. said: "The case of *Hart* v. *Windsor* (2) is an authority that the word 'let' has the same effect in this respect"—i.e., as to implying a covenant—"as the word 'demise,' and that any other equivalent word would have the same effect. I think we must take it on this record that the lease did contain the word 'let' or 'demise.'" Archibald J. agreed that the lease as it appeared on the record imported a covenant for quiet enjoyment, and that the lessees would be entitled to recover damages for the breach of it; and Lindley J. agreed that on the counter-claim the defendants were entitled to some damages for the breach of the implied covenant for quiet enjoyment.

In 1889 the point was again raised in the Court of Appeal in *Robinson* v. *Kilvert*. (3) The agreement there was a short agreement in writing whereby the defendants "agree to let" to the plaintiff certain premises. The plaintiff alleged a breach of the implied contract for quiet enjoyment, and this was the point pressed on the appeal. Lindley L.J. said: "*Bandy* v. *Cartwright* (4) shews that under a demise by parol there is an implied covenant for quiet enjoyment"; and he added that if the evidence had been sufficient he would have been prepared to hold that there was a breach. Then followed *Baynes & Co.* v. *Lloyd & Sons*. (5) In that case the plaintiffs sued for breach of an implied covenant for quiet enjoyment; the document sued upon was an underlease which did not contain any express covenant for title or quiet enjoyment, nor was the word "demise" used. Lord Russell of

(1) 1 C. P. D. 145, 152, 154.
(2) 12 M. & W. 68, 85.
(3) 41 Ch. D. 88, 96.
(4) 8 Ex. 913, 919; 22 L. J. (Ex.) 285.
(5) [1895] 1 Q. B. 820, 826; [1895] 2 Q. B. 610, 615, 616.

Killowen C.J., in the Court below, held that the law imported a covenant for quiet enjoyment in all cases where the relation of landlord and tenant is established by instrument under seal, and imported a contract to the same effect where the instrument is not under seal; and added: "I think, as stated by Cockburn C.J. in the latter case"—*Hall* v. *City of London Brewery Co.* (1)—"that the law is founded in good sense, and that a covenant for quiet enjoyment is imported ex vi termini." Lord Russell C.J., however, held that the plaintiff could not recover in that case, as the implied covenant had determined with the interest of the lessor, which had expired. That case was affirmed by the Court of Appeal on the same ground as Lord Russell C.J. had decided it, namely, that any implied covenant had determined with the estate of the lessor; but Kay L.J., in delivering the judgment of the Court of Appeal, said: "The weight of authority is in favour of the view that a covenant in law is not implied from the mere relation of landlord and tenant, but only from certain words used in creating the lease." This opinion was considered by the Queen's Bench Division shortly afterwards. *Budd-Scott* v. *Daniell* (2) was a case in which the defendant counter-claimed for breach of an implied contract for quiet enjoyment. There was a written agreement not under seal, whereby the plaintiff "agrees to let" a house for a year. The word "demise" was not used. Lord Alverstone C.J. considered that on principle and common sense an agreement for quiet enjoyment ought to be implied; and, after reviewing the authorities, he treated the observations of the Court of Appeal in *Baynes & Co.* v. *Lloyd & Sons* (3) as dicta only, and said that the Court was not bound to treat that case as an authority binding on the Court on that point; and he held that, where there is a letting, a covenant for quiet enjoyment is to be implied from the mere relationship of the parties. Darling and Channell JJ. concurred, the latter pointing out that the expression of the opinion of the Court of Appeal in *Baynes & Co.* v. *Lloyd & Sons* (3) was different from what he had always understood to be the law, and from

(1) 2 B. & S. 737, 741, 742.
(2) [1902] 2 K. B. 351, 356, 358, 361.
(3) [1895] 1 Q. B. 820, 826; [1895] 2 Q. B. 610, 615, 616.

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what all the text-book writers had understood to be the law up to that time.

And in the subsequent case of *Jones* v. *Lavington* (1) the Court of Appeal did not itself treat *Baynes & Co.* v. *Lloyd & Sons* (2) as having decided that a contract for quiet enjoyment could not be implied from the word "let."

Under these circumstances I am bound to follow what the current of authority for more than the last sixty years has determined to be the law, and what three Chief Justices of England have successively held to be the common law, both upon principle and authority, and to be the only view consistent with common sense. I therefore determine that the plaintiff is entitled to recover against the defendant on the footing that the tenancy agreement contains an implied contract for quiet enjoyment.

The further question was raised whether any implied contract extends to a disturbance by title paramount to the lessor. In Platt on Covenants, p. 313 (part 3, ch. 11, s. 3, "Of the Covenant for Quiet enjoyment"), the law is thus stated: "A general covenant for quiet enjoyment was in earlier times holden to extend to tortious evictions or interruptions; but this doctrine was never freely acquiesced in; and a different rule is now established; so that at present, when we speak of a covenant providing against the acts of all men, it is to be understood, of all men claiming by title; for the law will not adjudge that the wrongful acts of strangers are covenanted against. Hence, if one who has no right ousts or disseises a purchaser, he shall not have an action of covenant against the vendor; the reason being, that the law has already furnished the means of redress, by giving the injured party an action of trespass against the wrong-doer. As far back as the time of Henry VI. we find a case involving this very point. It was said, that if a lease be made for a term of years by deed, so that the lessor is chargeable by writ of covenant, if a stranger who has no right ousts the termor, yet he shall not have a writ of covenant against his lessor. But if he to whom the right belongs ousts the termor, then he shall

(1) [1903] 1 K. B. 253; 72 L. J. (K.B.) 98, 100.

(2) [1895] 1 Q. B. 820, 826; [1895] 2 Q. B. 610, 615, 616.

have covenant against his lessor. And this was followed by another decision, to the same end, in the reign of Henry VIII.; where it was contended, that a writ of covenant would not lie against a lessor on an eviction of the lessee by tort; because no mischief arose to the lessee therefrom, inasmuch as trespass lay against the evictor; but when the ouster was by one having title paramount, against whom the lessee had no remedy, then covenant could be supported against the lessor; quod fuit concessum per plusieurs." And Vaughan C.J., in *Hayes* v. *Bickerstaff* (1), gives many reasons why the lessor should not be liable for the tortious acts of strangers. The text-books point out that with regard to title paramount the usual express qualified covenant is a less protection to the lessee than the implied covenant. Thus in Woodfall's Landlord and Tenant, 18th ed. (1908), at p. 779, it is stated that "the express covenant for quiet enjoyment is usually a qualified one only, and is in one respect a less protection to the lessee than the implied one, inasmuch as it does not protect the lessee in case of an eviction by title paramount to that of the lessor, as . . . . the implied covenant does." And again, at p. 778, it is said that until *Baynes & Co.* v. *Lloyd & Sons* (2) it had been generally supposed that the implied contract extended to interruptions by title paramount. Now in *Baynes & Co.* v. *Lloyd & Sons* (2) there was no decision on this point, the Court of Appeal merely stating that there was considerable conflict of authority on the question. The only case there referred to as shewing that the implied covenant is limited is *Andrews' Case* (3), with regard to which it was said: "In *Andrews' Case* (3) it was held to be limited, and that upon the covenant implied from the word 'demise' an action would lie if the lessor himself entered upon the lessee, but not if a stranger entered." It was urged before me that this passage meant that, if persons claiming through the lessor entered, an action would lie on the implied covenant, but not if a person entered by title paramount. I do not so understand it. In *Andrews' Case* (3) the decision was that an action in covenant would lie against a lessor if he tortiously entered upon his lessee

(1) (1669) Vaugh. 118, 122.
(2) [1895] 1 Q. B. 820, 826; [1895] 2 Q. B. 610, 615, 616.
(3) 2 Leon. 104; Cro. Eliz. 214.

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—that is, that the lessee was not compelled to bring an action of trespass against the lessor, as in the case of any other wrong-doer, but might bring covenant; while if a stranger entered, which means if a wrong-doer (other than the lessor) tortiously entered, no action could be brought against the lessor for this, the lessee having an appropriate remedy against the wrong-doer himself. This seems clear from the explanation of this and other cases given in Platt on Covenants at pp. 318–319, where it is said: "In a case in Rolle's Abridgment, it is laid down, that a covenant by J. S. that his lessee shall enjoy the lands peaceably and quietly, without any *lawful* let, disturbance, ejectment, or molestation of the said J. S., is not broken by his entry on the lessee as a mere trespasser, and without any lawful title. Subsequent decisions, however, have taken a distinction between a tortious entry by a stranger, and by the covenantor himself; and it is now admitted law, that although the covenant only stipulates for quiet enjoyment, without the lawful interruption of the covenantor, his heirs or assigns, yet he cannot avail himself of the subterfuge that his entry was unlawful, and he, therefore, a trespasser, to avoid the consequences of his own wrong; for, as against the party himself, the Court will not consider the word *lawful*, nor drive the covenantee to an action of trespass, when, by the generally implied covenant in law, the vendor had engaged not to annul his own deed, either by a rightful or an illegal entry."

Although *Baynes & Co.* v. *Lloyd & Sons* (1) is not an authority that any implied covenant is limited to the acts of the lessor, or persons claiming under him, the subsequent case of *Jones* v. *Lavington* (2) did decide that point; and although it only purported to follow *Baynes & Co.* v. *Lloyd & Sons* (1), and notwithstanding other decisions to the contrary, it would be my duty as a judge of first instance to follow the latest decision of the Court of Appeal, and decide—if it were necessary to decide the point—that any implied contract did not extend to persons claiming by title paramount; but as the company in the present case claim through and under the defendant, it is not in my opinion

(1) [1895] 1 Q. B. 820, 826; [1895] 2 Q. B. 610, 615, 616.

(2) [1903] 1 K. B. 253; 72 L. J. (K.B.) 98, 100.

necessary that I should give any decision on this point, and accordingly I abstain from doing so.

The result is that there must be judgment for the plaintiff against the defendant for 700*l.* for damages for breach of the implied contract for quiet enjoyment. The measure of damages would also be the same on the footing of the defendant derogating from her grant. The defendant must pay the costs of the action.

There remains the third party notice, upon which the defendant claims indemnity from the company, by virtue of the covenant for indemnity contained in the mining lease by the demising trustees to the company. There are several answers to this claim. If the defendant upon her letting to the plaintiff had merely purported to grant to him such interest as she could demise, having regard to the existing mining lease to the company and their powers of letting down the surface, her liability to the plaintiff would not have arisen. She purported to give the plaintiff an easement of support, which she had not the power to grant, and she cannot by exceeding her own powers subject the company to a liability that they would not otherwise have been under. Again, the defendant, if she claimed the benefit of any covenant entered into with the demising trustees, could not have any higher or better title than the demising trustees, and the damage to the plaintiff occurred by reason of the engineer declining, both on behalf of the demising trustees and the defendant, to assent to the pillar being left pursuant to the provisions of the lease.

Without, however, further considering the third party notice, I think that it may be disposed of upon the short and simple ground that the covenant for indemnity upon which the notice is based was not entered into with the defendant, and she is not entitled to sue upon it.

The third party notice must be dismissed with costs.

Solicitors: *Bird & Bird; Ullithorne, Currey & Co., for Barber, Currey & Currey, Derby; Cooper & Co., for Davies, Sanders & Swanwick, Chesterfield.*

G. R. A.

C. A.
1908
Feb. 4, 5.

In re FREEMAN.
SHILTON *v.* FREEMAN.

[1907 F. 1012.]

Charity—Bequest to Charity Organization Society in Trust "for such other Society or Societies as shall in the Opinion of the governing Body be most in need of Help"—Ejusdem generis—Invalidity.

Testator, after making bequests to two missionary societies, gave the residue of his estate to the treasurer for the time being of the Charity Organization Society in trust to invest the same, and out of the annual income thereof to retain one tenth part "for the purposes of the society as the governing body may think fit, and to divide and pay the residue of such annual income to such other society or societies as shall, in the opinion of the governing body of the Charity Organization Society, be most in need of help, besides fulfilling the standard of good management, efficiency, and economy of such Charity Organization Society"; and the testator appointed the plaintiff and the treasurers for the time being of the Charity Organization Society executors and trustees of his will:—

Held, that the gift of the nine-tenths of the income of the residue was not a valid charitable bequest.

Appeal from the decision of Joyce J.

The testator, by his will dated December 15, 1903, devised and bequeathed the whole of his estate and effects unto his trustees upon trust to sell the same, and out of the proceeds of sale thereof to pay his funeral and testamentary expenses and legacies. After making bequests to two missionary societies, the testator gave the residue of his estate to the treasurers for the time being of the Charity Organization Society in London, or any other society or corporate body which might thereafter be formed to take over its property or carry on its work, upon trust to invest the same, and out of the annual income arising from such investment to pay and retain one tenth part of such income "for the purposes of the society as the governing body may think fit, and to divide and pay the residue of such annual income to such other society or societies as shall, in the opinion of the governing body of the Charity Organization Society, be most in need of help, besides fulfilling the standard of good management,

efficiency, and economy of such Charity Organization Society." The testator appointed the plaintiff and the treasurers for the time being of the Charity Organization Society to be executors and trustees of his will.

The testator died on June 19, 1906, and his will was proved in solemn form by the plaintiff and by the treasurer of the Charity Organization Society.

Upon an originating summons, taken out by the plaintiff for the determination of the question, Joyce J. held that the bequest of the nine-tenths of the income of the residuary estate was not a valid charitable bequest, but passed to the next of kin as undisposed of.

Against this decision the Attorney-General appealed.

Sir W. S. Robson, A.-G., and *G. Lawrence*, in support of the appeal. If a general charitable intention be shewn, the mere fact that the bequest is in wide terms does not invalidate it: *In re Douglas.* (1) Here the intention of the testator is manifestly charitable. The Charity Organization Society has no right to devote its energies to any but charitable purposes and objects. The expression "other society or societies" means societies ejusdem generis with the Charity Organization Society. The only business of the Charity Organization Society is charity, and for that reason the testator, whose intention was charitable, chose them to carry out his wishes.

Younger, K.C., and *Dighton Pollock*, for the respondents. There is here no indication of a general charitable intention, and the gift of nine-tenths of the income fails: *Hunter* v. *Attorney-General.* (2) If the Charity Organization Society could apply any portion of the fund to non-charitable objects, then the whole gift is void. It is clear that they might so apply it; for instance they might give it to a friendly society; and that is not a charitable institution: *In re Clark's Trust* (3); *Cunnack* v. *Edwards.* (4) The clause in the will cannot be read as a gift to other societies ejusdem generis with the Charity Organization Society. Except by making a new will for the testator, this gift cannot be upheld.

(1) (1887) 35 Ch. D. 472.
(2) [1899] A. C. 309, 317.
(3) (1875) 1 Ch. D. 497.
(4) [1896] 2 Ch. 679.

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FREEMAN, *In re.* SHILTON *v.* FREEMAN.

T. T. Method, for the trustees.

W. F. Webster, for the Charity Organization Society.

COZENS-HARDY M.R. I am of opinion that the judgment of Joyce J. in this case is right.

The clause in the will is very short, and the principle which has to be applied to it is, I think, this: that you must find, either by express words or by necessary implication, that the testator did intend his whole residue to be devoted to charities, and if so you are entitled, and indeed bound, to qualify the generality of certain words which, in the absence of any such purpose, would include bequests both charitable and non-charitable. Now, what are the words here? I pass over pecuniary legacies to two missionary societies, which seem to me to have no bearing upon the present case, and then in clause 5 we have the gift of the residue. [His Lordship read the first part of the gift, and continued:—]

There is no question here that that gift is good. There is no appeal about that. Then it goes on, "and to divide and pay the residue of such annual income"—that is, nine-tenths—"to such other society or societies as shall, in the opinion of the governing body of the Charity Organization Society, be most in need of help, besides fulfilling the standard of good management, efficiency, and economy of such Charity Organization Society."

Now it can scarcely be said (I do not think it was really contended on the part of the Attorney-General) that you can get any material indication of a general charitable purpose from the mere fact that the trustee is itself a charitable society. The question is not what a trustee is, but what are the cestuis que trust and what are the beneficiaries? But then it is said, Why did the testator choose this particular body which was not merely a charity, but a charity of a peculiar kind—a charity for organizing charity, the governing body of the Charity Organization Society? And it is said that we ought to have regard to this fact, that the Charity Organization Society does endeavour, with very considerable success, not merely to relieve deserving poor, but to get other societies of a similar kind to come up to their standard; in other words, they endeavour to put a stop to

charities which spend nineteen shillings out of a pound in administration. But I regret that I am unable to find in those words any indication of a charitable intent sufficient to enable me to put a narrow meaning upon the words "such other society or societies" in the latter part of the gift. It is said that that expression must mean societies ejusdem generis. It seems to me impossible to say that it means, not merely charitable societies, but charitable societies of the same class, and having the same objects, and the same objects only, as the Charity Organization Society itself. I cannot find that indication in the language of the will, and therefore it seems to me that there is nothing here to justify the contention of any general intent to dispose of the whole residue for charitable purposes.

But then another ingenious point is raised. It is said that the residue of the income is not only to be applied to such other societies as shall, in the opinion of the governing body of the Charity Organization Society, be most in need of help besides fulfilling the standard of good management, efficiency, and economy of such Charity Organization Society, but that the whole modus operandi of the Charity Organization Society itself is imported into the gift. Now there is nothing in the report or in the regulations, so far as they are regulations, of the Charity Organization Society which defines any standard of good management, efficiency, and economy, and I think that the better meaning of those words is that it is an attempt to give the governing body of the Charity Organization Society a power to distribute nine-tenths of the income between such societies, whether charitable or not, as they deem most in need of help, and which fulfil the standard of good management, efficiency, and economy which the Charity Organization Society from time to time may require from them before they give them any money. With that limitation no help can be derived by the appellant in support of his view, and on both grounds I think that this appeal fails, and that the decision of the learned judge was perfectly right.

FLETCHER MOULTON L.J. I am of the same opinion, and I think that in so deciding we are only in reality abiding by the

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Fletcher Moulton L.J.

idea of the testator, although he did not know that to do so would on legal grounds defeat the whole of his object.

I agree with the Master of the Rolls in all the reasons he has given, more especially when he says that the selection of the trustee does not by any means limit or define the objects of the trust, and although I think that the selection of the Charity Organization Society and its successors as the trustees shews that the testator intended his money to be applied for public purposes, I do not think that we can from that alone arrive at any dedication of the property to what in a legal sense are called charitable purposes. We must look at the description of what are to be the objects of the trust. Now, the Charity Organization Society has earned for itself a well-deserved renown, not only for the purity of its motives, but also for the breadth of its views and for its having realized that many of these problems of poverty are best dealt with indirectly rather than directly, and that putting a stop to such abuses as indiscriminate charity is a better way of assisting the poor than giving them doles. The consequence is that it looks upon many branches of work that are going on in the realm as being directly serviceable to the cause of the poor, although they would not come within the legal definition of charitable purposes; and I think that in leaving nine-tenths of the income of his residue to this society, without any words in any way restricting its freedom in using this money of which it was only the trustee, and which money was not to form part of its funds or be bound by its objects, the testator believed that he would establish an annual fund which would be distributed with a wise discretion and would be productive of great public good. If he could legally have accomplished his object I think it would have been a very wise plan. Unfortunately such a limitation is far too wide to be supported as creating a charitable gift; it is too uncertain. The Charity Organization Society might under the powers so given have used this money for many purposes of public utility, and in assisting many worthy societies whose purposes could not be called charitable in a legal sense. The gift therefore being too wide, we cannot support it.

A bold attempt was made to give definiteness to the description

of the persons who were to receive the bounty by saying that "such other society or societies" must mean societies ejusdem generis with the Charity Organization Society—that is to say, societies for the purposes of charity organization. I am convinced that this was not the intention of the testator. It would be a far too narrow interpretation of the words "other society or societies." He intended to give far more discretion to the Charity Organization Society in the distribution of the fund than such an interpretation would give, and for these reasons I cannot accept it.

BUCKLEY L.J. I am far from saying that there does not exist in this will any basis for the superstructure which the appellant's counsel have endeavoured to erect upon it in argument, but when the matter is examined, the will is read, and the argument tested, I think that that basis fails and the superstructure comes to the ground.

The basis on which the argument is founded is the fact that the Charity Organization Society are by the testator constituted the trustees as well of the one-tenth as of the nine-tenths, and the argument really results, stated quite briefly, in seeking to introduce the word "like" after the words "such other," so that it should read "such other like society or societies." The objects of the Charity Organization Society, broadly stated, are the relief of the poor; not any charitable purposes within the meaning of that word as known to the law, but a particular class of charitable purpose, namely, the relief of the poor. The Attorney-General agreed that his argument must be that the nine-tenths are given, not to any charitable purpose as known to the law, but to that class of charitable purpose which is encouraged and favoured by the Charity Organization Society—societies for the relief of the poor. It would result from that argument that societies such as those to which the testator had in the earlier part of his will given legacies, the Baptist Missionary Society or the London Missionary Society, would not be within the gift of the nine-tenths. I cannot think that that is so. I do not find in any words which the testator has used anything which would exclude from the class who are to take the nine-tenths charities such as those in whose

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favour he has given legacies earlier in his will. The argument in favour of ejusdem generis with the Charity Organization Society fails. I think myself that that test is fallacious.

Further, subject to something which I will say presently, it seems to me that no conclusion can be drawn from the fact that the Charity Organization Society is trustee. The quality or nature of the trustee is not by any words in the will introduced into the definition of the cestui que trust. The Charity Organization Society either could or could not—it is immaterial which for the present purpose—within its objects accept a trusteeship such as is here imposed upon it. That gives no assistance towards determining the character of the cestui que trust for whom it is to hold. It is true that, in the words of the definition of the cestui que trust, I do find these words, "fulfilling the standard of good management, efficiency, and economy of such Charity Organization Society." An argument might perhaps have been advanced, and possibly might have been supported, if it had been shewn that there was, and that the testator knew that there was, a particular standard of good management, efficiency, and economy which the Charity Organization Society always required as regards societies for the relief of the poor which they thought it desirable to assist, but it is agreed that nothing of that sort can be found. That being so, all we have as regards the definition of the cestui que trust is, stating it shortly, this, that it must satisfy these two tests, that in the opinion of the governing body it is most in need of help, and that in the opinion of the governing body it is well managed. If those are the only tests, then the governing body might perfectly well find that such a society as was put by way of illustration, a friendly society, which is not a charitable society, because its objects are not limited to the relief of the poor, would have been within the gift. That would be a society not charitable. I think the Charity Organization Society might have given to a society such as that; and, if that is so, of course this is not a good charitable gift, and the consequence is that the appeal fails.

Solicitors: *The Solicitor to the Treasury; Freeman & Cooke; G. Shilton; Wontner & Sons.*

G. A. S.

ATTORNEY-GENERAL *v.* FRIMLEY AND FARNBOROUGH DISTRICT WATER COMPANY.

C. A.
1908
SWINFEN EADY J.
Feb. 28.
C. A.
March 26.

[1907 A. 1057.]

Water Company—Powers—Special Act—Purchase of Land by Agreement—Sinking Well—Erecting Pumping Station—Ultra vires.

A water company incorporated by a special Act for the purposes of making and maintaining the waterworks thereby limited and defined, and for supplying water within the limits of the Act and for carrying on the business usually carried on by water companies, was empowered, in addition to the lands authorised to be taken compulsorily, to acquire by agreement and hold for the general purposes of its undertaking any lands within its limits of supply not exceeding a certain acreage, provided that no buildings should be erected thereon except such as were required for the purposes of the company's waterworks. Under this power the company purchased land some distance away from its waterworks and proposed to sink a well and erect a pumping station thereon for the purpose of tapping a new water supply and pumping the water into an existing reservoir constructed under the powers of the Act:—

Held, that the power to purchase additional land was only for purposes ancillary to the main purpose of the company, which was to supply water within its limits of supply by its statutory waterworks, and that the proposed works were ultra vires.

THIS action was brought by the Attorney-General on the relation of several riparian owners on the river Whitewater near Odiham, in Hampshire, for an injunction to restrain the Frimley and Farnborough District Water Company from sinking wells and erecting a pumping station on certain lands in the parish of Odiham which the company had acquired by agreement.

The only question argued at the trial was whether the proposed works were intra vires. The question turned wholly on the construction of the defendant company's special Acts, but these were said to be practically identical with those of numerous other water companies.

The defendant company was incorporated by the Frimley and Farnborough District Water Act, 1893 (56 & 57 Vict. c. clxxxv.). This Act recited (inter alia) that the several

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parishes and places in the counties of Hants and Surrey thereinafter mentioned were at present inadequately supplied with water, and that it was expedient that provision should be made for affording an adequate supply of pure and wholesome water thereto, and that certain persons therein named were willing, on being incorporated into a company, to undertake the supply of water to such parishes and places, and it was expedient that they should be incorporated accordingly and authorised to construct waterworks "as by this Act provided," and also that plans and sections showing the lines, situations, and levels of the works authorised by the Act, and also a book of reference to the plans containing the names of the owners and occupiers of the lands required or which might be taken for the purposes or under the powers of the Act, were duly deposited with the clerk of the peace for the county of Surrey.

Sect. 3 provided: "In this Act the several words and expressions hereinafter mentioned have the meanings hereby assigned to them unless there be something in the subject or context repugnant to such construction (that is to say) . . . . The expressions 'the waterworks' and 'the undertaking' respectively mean and include the waterworks and the works connected therewith and the undertaking by this Act authorised."

Sect. 5 defined the limits of the Act for the supply of water, thereinafter referred to as "the limits of this Act" or "the district," in terms which did not include the site of the works which were the subject of this action.

The other material sections were as follows:—

"6. The company shall be established for the purpose of making and maintaining the waterworks and for supplying water within the limits of this Act and for carrying on the business usually carried on by water companies and generally for carrying the powers of this Act into execution."

"23. Subject to the provisions of this Act the company may make and maintain in the lines and situations and according to the levels shewn on the deposited plans and sections the waterworks hereinafter described with all proper and necessary embankments filtering beds . . . . and other apparatus engines works and conveniences connected with the said works or any

of them or incidental thereto or necessary or convenient for inspecting maintaining cleansing repairing conducting or managing the same and may enter upon take and use such of the lands delineated on the deposited plans and described in the deposited book of reference as may be required for that purpose. The waterworks hereinbefore referred to and authorised by this Act are situate in the parish of Frimley, in the county of Surrey, and are . . . ." Then followed a detailed description of certain reservoirs, pumping stations, and lines of pipes, and the section continued: "And the company may by means of the said works or any of them take divert store and use the water which now flows along the London and South Western Railway into the river or stream known as the Blackwater and the water of the Basingstoke Canal and the springs streams and other waters upon or under the lands acquired by the company under the powers of this Act or which may be taken impounded intersected or collected by means of the works authorised by this Act or any of them." Then followed a provision that before taking any water the company should pay certain fixed sums as compensation to the owners of mills therein named.

"27. The powers of the company for the compulsory purchase of lands for the purposes of this Act shall cease after the expiration of three years from the passing of this Act.

"28. If the works authorised by this Act be not completed within five years from the passing of this Act then on the expiration of that period the powers by this Act granted to the company for executing the same or otherwise in relation thereto shall cease except as to so much thereof as s then completed but nothing in this section shall restrict the company from extending their works mains and pipes from time to time whenever it shall be necessary for the purpose of increasing or distributing the supply of water within their existing limits of supply."

"30. In addition to any other lands which the company are under this Act authorised to take or purchase the company may by agreement take purchase and hold for the purposes of this Act and for the general purposes of their undertaking any lands within their limits of supply not exceeding in the whole five acres in extent or any easement (not being an easement

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of water) in over or under any such lands Provided that the company shall not upon any such lands create or permit any nuisance and that no buildings shall be erected on such lands except such as are required for the purposes of the company's waterworks."

By the Wey Valley, Frimley, and Farnham Water Act, 1898 (61 & 62 Vict. c. cclx.), the limits for the supply of water by the Frimley Company were extended to include the parish of Odiham, and it was provided that the Frimley Act should, subject to the provisions of the Act of 1898, be read and construed accordingly.

By the Frimley and Farnborough District provisional order of the Board of Trade, confirmed by the Water Orders Confirmation (No. 1) Act, 1901 (1 Edw. 7, c. clxiv.), it was provided that s. 30 (purchase of lands by agreement) of the Act of 1893 should be read as if the words "ten acres" had been inserted therein in lieu of the words "five acres."

By a subsequent provisional order confirmed by the Water Orders Confirmation Act, 1904 (4 Edw. 7, c. clxxxvi.), the limits of supply were still further extended, and the company were empowered to acquire by agreement within their limits of supply for the purposes of the order and for the general purposes of their undertaking a further ten acres of land in addition to any lands which they were entitled to purchase under the Acts of 1893 and 1898 and the order of 1901.

The company had acquired by agreement three pieces of land amounting in the aggregate to five and a quarter acres in the parish of Odiham, and proposed to sink wells and erect pumping stations thereon which were not included in any of the works authorised by their special Acts and were in fact several miles distant from any works so authorised. It was intended to pump the water raised by the new works into a reservoir authorised by the company's original Act, and for this purpose to pass the water so raised through a rising main authorised by the same Act, but in order to get this water into the main so authorised it was necessary to construct a new rising main some miles in length.

The action came on for trial before Swinfen Eady J. on February 28, 1908.

Cripps, K.C., and *Whinney*, for the plaintiff.

Hon. E. C. Macnaghten, K.C., and *Cozens-Hardy* for the defendant company.

The following cases were cited: *Ware* v. *Regent's Canal Co.* (1); *Herron* v. *Rathmines & Rathgar Improvement Commissioners* (2); *Attorney-General* v. *Mersey Ry. Co.* (3); *Attorney-General* v. *North Shields Waterworks Co.* (4); *Shanghai Corporation* v. *McMurray* (5); *Simpson* v. *South Staffordshire Waterworks Co.* (6); *In re Huddersfield Corporation and Jacomb.* (7)

SWINFEN EADY J. (after stating the facts). The action is based upon the allegation that the company is exceeding its powers and has no right to erect the new waterworks.

There is nothing within the four corners of the Act of 1893 empowering the company to proceed with the new works, except the provision to purchase the additional land by agreement, the provision to extend the works, mains, and pipes of the company, and the general provision in s. 6 whereby the company was empowered to carry on the business usually carried on by water companies and generally to carry the powers of the Act into execution. I think the argument on each side may be summed up in this way. The Attorney-General says that the defendant company can only do the thing which by statute they are authorised to do, and that they are exceeding their statutory powers. The defendants, on the contrary, say, "All we have done and are doing is lawful; we are entitled to buy the land, we have not exceeded the statutory quantity; we have bought the land, it belongs to us, we are entitled to sink a well on our own land, and the purpose for which we are sinking the well is not ultra vires, but intra vires; it is the very purpose for which we are incorporated—to supply water—it is to carry on the business of supplying water, for which purpose we were incorporated." I think that sums up the arguments which were addressed to me on behalf of the parties.

(1) (1858) 3 De G. & J. 212.
(2) [1892] A. C. 498.
(3) [1907] A. C. 415.
(4) *Times*, May 12, 1892 (cited in Michael and Will on Gas and Water 5th ed. p. 80).
(5) [1900] A. C. 206.
(6) (1865) 4 D. J. & S. 679.
(7) (1874) L. R. 17 Eq. 476, 487.

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Swinfen Eady J.

Now, in my opinion, the provision contained in the Act enabling the company to purchase additional land by agreement enables the company to purchase land for purposes ancillary to their statutory undertaking, and it really enables them to acquire the additional land for the purpose of either subsidiary works or conveniences enabling them to carry on more beneficially their statutory undertaking, and does not extend to enable them to acquire land for the purpose of carrying on upon it what is in substance a new undertaking. The proposed work does not come within s. 28. It is not an extension of the works, mains, and pipes, it is not an extension of the company's own works; it is a new source of supply, a new work not contemplated by the statute.

Then it is said that the company is only carrying on the business which s. 6 provided that it should be enabled to carry on, but in my view the true construction of that section is this. The company is established for the purpose of making and maintaining the waterworks limited and defined by the special Act, and the powers of the company to supply water and to carry on its business must have reference to those works. It is only those works and ancillary works that they are entitled to construct, and it is only by means of the said works that they are entitled to take, divert, store, and use water, including the water that they may acquire by purchase.

That construction is assisted by the language of s. 30, which, while enabling them to purchase additional land by agreement or any easement, prohibits their acquiring any easement of water in, over, or under any such lands, the view being that their sources of supply are those contained in the Act, and those only.

None of the cases cited at the bar is directly in point, but in *Ware* v. *Regent's Canal Co.* (1) the importance of the plans and sections laid before Parliament was commented upon; and again, in *Herron* v. *Rathmines and Rathgar Improvement Commissioners* (2), Lord Halsbury, citing with approval the language used by Barry L.J. in the Court below, says: "I concur with him that the most conspicuous of the safeguards 'against

(1) 3 De G. & J. 223. (2) [1892] A. C. 498, 513.

injustice to individuals in private legislation are the provisions (either legislative or by parliamentary rules) requiring the utmost publicity to be given to the intended works, and the deposit of plans and specifications in a public depository, enabling those who are likely to be affected by the proposed operations to see to what extent their rights would be so affected.' "

In substance the argument addressed to me on behalf of the defendants amounts to this. "As we have power to acquire not exceeding ten acres of land by agreement, if we please, we can abandon all the statutory works, abandon the pumping stations, collecting reservoirs, and other works defined by the Act; we need not erect them within the statutory time; we need not erect them at all; it is only permissive; and we can then buy not exceeding the maximum quantity of land anywhere within our limits of supply, and erect at what time we please and in what manner we please and according to any plans and sections that we please any works we like, because we have the rights of landowners to put up those, so long only as the works that we put up are for the supply of water." In my opinion that contention is not well-founded. The additional land is only for purposes ancillary to the main purpose of the company, and the main purpose of the company is to supply the water by their statutory works, and not by any works at any place within the limits of supply that the company choose to erect.

It would appear as if the decision of the Court of Appeal in *Attorney-General* v. *North Shields Waterworks Co.* (1) was in accordance with that view, but I do not place too much reliance upon this as it may be imperfectly reported. I have only a note of it in Messrs. Michael and Will's book, p. 80. It is apparently extracted from the *Times*, and it is very shortly reported indeed, but so far as it goes it is an express authority on the point, because it was an information by the Attorney-General alleging that the company was supplying water pumped from a colliery in excess of its statutory powers, the defendants being a statutory corporation, and Lord Esher is reported to have said that "the water company had compulsory powers to obtain fresh water

(1) *Times*, May 12, 1892.

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from springs, streams, or ponds, and to supply that water to the inhabitants of Tynemouth. The company would not be justified in obtaining and supplying water from any other source. If they exceeded their powers the Attorney-General could interfere to stop them."

I am of opinion that the Attorney-General has made out a claim for an injunction, and that the injunction ought to go restraining the defendants, their servants, agents, and workmen from constructing upon the three pieces of land recently acquired by them in the parish of Odiham in the county of Hampshire a pumping station, wells, or other subsidiary works for the purpose of raising, collecting, or storing water, and from carrying the same away for the purpose of their general undertaking.

J. R. B.

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The defendant company appealed. The appeal was heard on March 26, 1908.

Hon. E. C. Macnaghten, K.C., and *Cozens-Hardy*, for the defendant company. The defendant company has a statutory authority to take by agreement land of a certain acreage within its area of supply, and it is entitled to use that land for the purposes of its Act and for the general purposes of its undertaking: special Act of 1893, s. 30. The purposes for which the company was established are (1.) making and maintaining the waterworks; (2.) supplying water within the limits of their Act; (3.) carrying on the business usually carried on by water companies: s. 6. The sinking of a well and the erection of a pumping station are clearly within the second and third of these purposes. It is part of the ordinary business of a water company to erect works for the supply of water. In considering the extent of the company's implied powers you must look at the obligations to meet which those powers are required, and this company is under an obligation to supply all persons within its area of supply with pure and wholesome water subject to a penalty in case of default: Waterworks Clauses Act, 1847, ss. 35, 36. The company has an implied power to use this land in the same way

as a private individual so long as that user is not inconsistent with the purposes for which the company was constituted: *Foster* v. *London, Chatham and Dover Ry. Co.* (1) As regards the well, an ordinary landowner may draw off subterranean water not flowing in defined channels, and this company has the same power. As regards the pumping station, it stands on the same footing as the pumping station in the earlier part of the Act. If the Legislature empowers a water company to take twenty acres of land for the purposes of its undertaking, it is improbable that it should have intended to force the company to go to Parliament for power to use the land for those particular purposes. In this respect a gas company stands on a different footing from a water company, for the Gas and Water Works Facilities Act, 1870, provides that every provisional order shall expressly restrict the undertakers from manufacturing gas except on land specially authorised. The inference is that, apart from that restriction, the company would have been allowed to manufacture in the exercise of its ordinary common law rights as landowner. The defendant company has an implied power to execute these works by virtue of its ownership; they are for the purposes of its undertaking, and there is nothing in the Act to prohibit them. [They also referred to the authorities cited in the Court below.]

Cripps, K.C., and *Whinney*, for the plaintiff.

Cozens-Hardy M.R. In this appeal we have had the advantage of a very careful judgment of Swinfen Eady J., and, speaking for myself, I so entirely agree with and adopt that judgment that I almost doubt whether I should be justified in saying much more. But, having regard to the importance of the case, it is perhaps right that I should state the conclusion at which I have arrived in my own words. We are dealing here with a water company incorporated under an Act of 1893 for a particular purpose, to afford an adequate supply of pure and wholesome water to a certain district. The preamble then goes on to say that the incorporation was to enable the company to construct waterworks "as by this Act provided." What are the waterworks

(1) [1895] 1 Q. B. 711.

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constructed as by this Act provided? That you find in perfectly plain and clear language in s. 23. "The waterworks hereinbefore referred to and authorised by this Act are" certain specified pumping stations and collecting reservoirs which are there mentioned and about which there can be no doubt. The section goes on then to say that "the company may by means of the said works"—that is the said specified works—"or any of them take divert store and use the water which now flows along" certain particular courses which I need not mention, "and the springs streams and other waters upon or under the lands acquired by the company under the powers of this Act or which may be taken impounded intersected or collected by means of the works authorised by this Act or any of them." Now it seems to me plain that what Parliament did there was to incorporate the company with authority to make waterworks in a defined place or places and no more. Parliament certainly did not, and, so far as my experience goes, never does, give authority to a waterworks company to erect pumping stations and other works in such portion of a considerable area as they might think fit without any reference to the deposited plans or anything of that kind. But we have been referred to s. 30. That section, it is said, enables the water company to purchase, not compulsorily, but by agreement, a certain quantity of land within their limits of supply. I pass by for the moment the subsequent Acts and orders which alter the limits of supply and increase the number of acres which they may purchase. It is sufficient for the purposes of the argument to deal with s. 30 as it stands. [His Lordship read the section.] It seems to me reasonably plain that the power thereby conferred must be read as a power merely ancillary to the main undertaking, which, and which alone, was authorised by the Act. I cannot accept the view that the word "undertaking" here means the general supply of water to the area of supply by any means whatever, and it seems to me to bear the meaning which is given to it in the definition in s. 3: "The expressions 'the waterworks' and 'the undertaking' respectively mean and include the waterworks and the works connected therewith and the undertaking by this Act authorised." So far as the definition of "undertaking" is

concerned, that seems to me to be a mere repetition of the definition of "undertaking" in the Waterworks Clauses Act, 1847. Swinfen Eady J. thus describes the effect of s. 30. [His Lordship quoted from the words "Now in my opinion" down to the words "contemplated by the statute," and continued:—] I do not feel that I can put this branch of the case in better language than that used by the learned judge in the passage I have just quoted.

But there is another ground, not alluded to by Swinfen Eady J., which seems to me to be fatal to the appellants' case. What they are proposing to do is to erect a new pumping station some miles away from the existing waterworks, and without the erection of the pumping station no one would be so foolish as to dig the well. At the very end of this s. 30, upon which alone the appellants base their argument, you find this proviso, "that no buildings shall be erected on such lands"—those are the lands which are purchased by agreement within the limit of ten acres—"except such as are required for the purposes of the company's waterworks," that is for the purpose of the company's defined waterworks. Mr. Macnaghten asks us to read that as though it were "for any of the purposes of the undertaking, which undertaking is an undertaking to supply all the inhabitants of the district with water." The proviso at the end of s. 30 seems to me to be as clear a negative of the right to erect a pumping station where it is proposed to do so as is to be found in the section of the Gas Works Clauses Act to which our attention has been called by Mr. Macnaghten's junior.

On both of these grounds it seems to me that this appeal wholly fails, and, if the company want to obtain a fresh source of supply and to erect a new pumping station and to tap a new gathering ground, they must apply to Parliament for statutory powers, when Parliament will take care that all persons who may be affected by what they propose to do will be heard and have their rights, if any, protected. The appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. The point is a very important one, and it goes to the root of the waterworks legislation in this country. The distribution of

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water to the population of the country is practically impossible unless by means of statutory powers, especially the statutory powers of laying down pipes under the public streets and highways. The consequence is that companies which are desirous of supplying water are bound to come to Parliament for the great privileges which enable them to do so. That being so, Parliament has a right to give to these companies just what powers it thinks best, and upon what terms it thinks best, and it has, therefore, to consider what, in fairness to the public and also to individuals, are the powers which should be given to such companies.

Now the case of water is one in which the problem is, no doubt, a difficult one, because by common law a freeholder has the power of appropriating such water as he can intercept underground—under the land that belongs to him. But there is a great practical difference between the effect of that power on the rights of his neighbour when he can only use it for his own purposes and when he has an almost limitless outlet for that water given to him by such statutory powers as are usually given to water companies. Looking at the legislation as a whole, and the legislation referring to this company in particular, it is clear to me that Parliament has appreciated the distinction between the two cases, and has taken the line of defining strictly what waterworks may be made by the company that it creates or empowers by these Acts of Parliament, and that it has given to the company no power to erect or work other waterworks than those that have been submitted to it and the propriety and the suitability of which it has considered. It does not permit him to add to those waterworks which have thus been specifically approved of by Parliament other waterworks by the simple means of purchasing or otherwise acquiring land and availing itself of the ordinary powers of a freeholder to collect water thereunder.

Whether this is so or not is, of course, to be ascertained from the language of the Acts which govern the company, but, as is the case, I believe, in all Waterworks Acts, these Acts embody the whole or large portions of the Waterworks Clauses Acts which contain statutory clauses, or collections of clauses, which the Legislature insists upon putting into all private Waterworks Acts. When we look at the Waterworks Clauses Act, 1847, which

indicates in the most authoritative way the principles which guide this branch of legislation, we find: "The expression 'the undertaking' shall mean the waterworks, and the works connected therewith, by the special Act authorised to be constructed." On turning to s. 12, which gives the power of construction of works to the company, we find that the whole of s. 12 relates only to the specific works on the specific sites that have been put before the Legislature when the special Bill is applied for. Therefore it is quite clear that the Legislature intended that in future Waterworks Acts the power of constructing waterworks should be confined to those which had been specifically shewn in the plans and sections.

Now, when I turn to the Act of 1893, which is the fundamental Act of this company, I find that the preamble says that it is expedient that the company should be "authorised to construct waterworks as by this Act provided." Then it goes on to say, "Whereas plans and sections shewing the lines situations and levels of the works authorised by this Act &c."; then, in the definition clause, it provides that "the expressions 'the waterworks' and 'the undertaking' shall respectively mean and include the waterworks and the works connected therewith and the undertaking by this Act authorised" (the word "undertaking" being wider than waterworks only in the sense that it includes the trading undertaking, the staple of which is the product of these waterworks), and then I find, in s. 23, "the waterworks hereinbefore referred to and authorised by this Act are situate in the parish of Frimley in the county of Surrey and are"—and then a detailed description of them follows.

Looking at these provisions, I cannot come to any other conclusion than that this waterworks company is only empowered to make certain specified waterworks, and that it is entitled to carry on the business of a water supply company by means of those waterworks only.

Now, in almost all public undertakings, not only waterworks, but also gasworks and railways, it is necessary to give a certain amount of liberty to the company to hold lands other than the specific lands on which the works are to be erected, the power to hold which is impliedly given in the clauses relating to the

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construction of the works. You cannot foresee the wants of a company like this, which is to last probably for an indefinite length of time, and therefore it is usual to allow it to hold a certain small quantity of unspecified land. That is provided for in s. 30, which says: "In addition to any other lands which the company are under this Act authorised to take or purchase the company may by agreement take purchase and hold for the purposes of this Act and for the general purposes of their undertaking any lands within their limits of supply not exceeding in the whole five acres." That clause is found, I believe without exception, in all these private Acts, the only difference being the quantity of land which is thus allowed to the company.

In my opinion we should be shutting our eyes to the whole structure and intention of these Acts if we were not to recognize that the land which the company is thus entitled to hold is only to be ancillary to the general purposes of the company which are specifically defined in those sections which mark out the works which they are entitled to construct; and therefore I do not think that the fact that they can hold these lands in any way increases their power of erecting waterworks. In this particular instance, as the Master of the Rolls has pointed out, there is a special prohibition at the end of the section which makes this abundantly clear, but apart from that, in my opinion, those pieces of land are only ancillary to the works and they do not increase the power of erecting waterworks. We should be acting contrary to the whole scheme of legislation of this kind if we were to hold that, after the Legislature had required plans and sections of the proposed waterworks to be put before it and had taken evidence with regard to their suitability, and had so carefully pointed out that the Act related to those waterworks—those special waterworks—it had added a clause which defines the amount of land to be held simply by its quantity and not by its position, so that it would be open to the company to take ten sites of half an acre or five sites of an acre anywhere in the district and erect new waterworks there, and, thus, merely by getting access to some public road along which they would have the statutory power to lay their pipes, to start five or ten new

waterworks, the propriety of which had never been considered by Parliament.

For these reasons I think that the judgment of Swinfen Eady J. exactly touches the point on which this case ought to be decided; that this permission to hold the additional lands is purely ancillary; and that, therefore, an attempt on the part of the company to avail themselves of this power for the purpose of getting new sources of supply is ultra vires.

Buckley L.J. The argument presented to us for the appellants—similar, as I gather from the judgment of Swinfen Eady J., to that which was presented to him—is shortly as follows:—"The defendant company have statutory power to acquire lands by agreement, and they have done so. Upon that land it is lawful for them to erect any waterworks, including, to use the language of the injunction which has been granted, 'a pumping station, wells, and other subsidiary works for the purpose of raising, collecting, or storing water.' This results from the fact that the defendant company is a waterworks company."

From that argument I entirely dissent. These Acts seem to me to provide for two subject-matters, the difference between which it is necessary to bear in mind. The one is the right to collect the water which is going to be used for distribution; the other is the right to distribute the water so collected. With the latter of those s. 5 of the Act of 1893 is concerned. It defines "the limits of this Act for the supply of water"; that is to say, it defines over what area of country the waterworks company may look for customers. That area of supply has been twice enlarged, once by s. 69 of the Act of 1898, and again by s. 7 of the order of 1904. In so enlarging the area of supply it is quite true that the Acts have to some extent enlarged the works which the company may construct. For instance, looking at art. 7 of the order of 1904, they are to have "the like powers privileges and authorities for or in relation to the supply of water," and so on, as they have under the previous Acts, and they may "continue maintain and use any mains pipes and works laid down or constructed by them in the new limits." Within the new area of supply, therefore, they may no doubt have

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new works such as new pipes and connections for the purpose of reaching the new customers. That is the one subject-matter. The other is the collection of the water with which they are going to deal. That is dealt with by s. 23 of the Act of 1893. That authorises the company to construct certain defined waterworks, and then goes on to provide that "The company may by means of the said works or any of them take divert store and use" certain water, which the Act then goes on to define. There is not contained in the Acts anywhere any larger power of taking, diverting, storing, and using water.

What the appellants here say is that because they have rightfully acquired certain small additional acreages of land —it was originally five, it was enlarged to ten, and then it was enlarged to twenty acres—that entitles them to erect upon those lands new waterworks in the sense of new works for the purpose of taking, diverting, storing, and using water. To my mind there is nothing in the Acts of Parliament which gives them any such authority.

I need say no more than that, having read the judgment of Swinfen Eady J., it seems to me entirely to cover the ground. I agree with that judgment, and I think this appeal must be dismissed with costs.

Solicitors: *Johnson, Weatherall & Sturt, for Potter & Crundwell, Farnham; Radcliffe, Cator & Hood.*

H. B. H.

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[1908 B. 611.]

March 14, 18, 19, 20; *April* 3.

Company—Reconstruction—Memorandum of Association—Sale of Undertaking to New Company for partly-paid Shares—Distribution of Consideration—Ultra vires—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 38, *sub-s.* 4; *s.* 161.

The sale of all a company's assets and all its undertaking and the distribution of the proceeds cannot be a corporate object so that under a clause for that purpose introduced into the memorandum of association such a sale and distribution can be made without regard to the provisions of s. 161 of the Companies Act, 1862.

A company limited by shares cannot by its memorandum and articles of association provide as part of its constitution that in an event the corporator shall either submit to a liability in excess of the limit of liability on his shares or shall be dispossessed of his status as corporator.

Where, therefore, a limited company, which had issued 1,770,386 fully-paid shares of 1*l.* each, acting under the powers of its memorandum and articles of association, passed resolutions in general meeting approving a scheme of reconstruction and for a voluntary winding-up, and by the scheme the undertaking of the company was to be sold to a new company to be formed for the purpose in consideration of a like number of 1*l.* shares in the new company, credited with 17*s.* 6*d.* per share as paid thereon, and the payment of the debts and the costs of liquidation of the old company, and the liquidator was to offer the shares in the new company (credited as aforesaid) for distribution among the members of the old company at the rate of one of such new shares for each share in the old company held by such members, and, in the event of any of the members not accepting their due proportion of such shares within a limited time, was to use his best endeavours to sell such shares and distribute the net proceeds among the non-accepting members in proportion to the number of shares in the old company held by them respectively:—

Held, that the scheme was ultra vires.

Cotton v. *Imperial and Foreign Agency and Investment Corporation*, [1892] 3 Ch. 454, and *Fuller* v. *White Feather Reward, Ld.*, [1906] 1 Ch. 823, overruled.

Bisgood v. *Nile Valley Co.*, [1906] 1 Ch. 747, approved.

Decision of Eve J. reversed.

Appeal from a decision of Eve J.

The plaintiff, who was the holder of fifty fully paid-up shares in the first-named defendant company, Henderson's Transvaal

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Estates, Limited, suing on behalf of himself and all other shareholders in the company, moved for an injunction to restrain the company until judgment in the action from carrying into effect a reorganization scheme submitted to, and the resolutions approving the same passed by, a general meeting of the shareholders held on February 13, 1908, or in the alternative from carrying into effect the said scheme or acting upon the resolutions, numbered 2, 4, and 5 respectively, passed at such meeting, in so far as the said scheme and resolutions purported to authorize the liquidator of the company, when appointed, to deal with the assets of the company without making proper provision for payment or satisfaction to the plaintiff of his distributive share in such assets as a shareholder of the company.

This company was incorporated on August 10, 1894, under the Companies Acts, 1862 to 1890. In November, 1907, the amount of capital issued was 1,770,386*l.* in fully-paid shares of 1*l.* each. The primary object of the company, as stated in clause 3 of the memorandum of association, was to purchase from Mr. J. C. A. Henderson certain mining properties in the Transvaal. Among the further objects therein stated were the following:

"(M.) To sell or otherwise dispose of any property of the company to any other company, person or firm, and in particular either for cash, shares, debenture stock or mortgage, or any other securities of any company, whether registered in South Africa, England or elsewhere, and whether such shares be fully paid or not:"

"(O.) To amalgamate with any other company in South Africa, England or elsewhere, whether the objects of such company are to include objects similar to those of the company or otherwise, and whether by sale or otherwise (for shares or otherwise) of the undertaking subject to the liabilities of the company or any such company as aforesaid, with or without winding up, or by sale or purchase (for shares or otherwise) of all the shares or stock of the company or any such other company as aforesaid, or by partnership or any arrangement of the nature of partnership, or in any other manner:

"(P.) To sell, exchange, let on royalty, share of profits or hire, or otherwise use or grant licenses, easements and other rights

of and in respect of, and in any other manner deal with or dispose of the whole or any part of the undertaking, business and property of the company to any company, firm or person in South Africa, England or elsewhere, and in consideration thereof to accept in whole or part cash or shares, stock, debentures or securities of any company, whether the objects of such company are or include objects similar to those of the company or otherwise, and to distribute any of the property of the company among the members in specie :

"(Q.) To form, register and promote any company, either limited by shares or otherwise, in South Africa, England or elsewhere, for the purpose of acquiring the properties or any of them of the company, or for any other purpose which may seem directly or indirectly calculated to benefit this company, and to subscribe for and take or otherwise acquire and hold shares, debentures or stock therein, or in any other company having objects altogether or in part similar to those of this company, or carrying on any business capable of being conducted so as directly or indirectly to benefit this company : "

The memorandum also empowered the company to do all things incidental or conducive to the attainment of the above objects. Clause 131 of the articles of association provided as follow :—

"If the company shall be wound up (whether voluntarily, under supervision, or compulsorily), the liquidator may, with the sanction of an extraordinary resolution, divide among the contributories in specie any part of the assets of the company, and may with like sanction vest any part of the assets of the company in trustees, upon such trusts for the benefit of the contributories as the liquidators with the like sanction shall think fit."

The company had issued debentures to the amount of 250,000*l.*, and the amount outstanding on June 30, 1907, was 102,400*l.* In the beginning of January, 1908, the company endeavoured to raise some additional capital by a further issue of debentures, but failed. In this state of things the directors, in order to provide for the repayment of the debentures falling due on March 31 and further working capital, proposed a reorganization

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scheme. By this scheme, as amended, a new company (being the second-named defendant company) was to be formed and registered in Rhodesia under the same name as the old company with a capital of 2,000,000*l.*, divided into 2,000,000 shares of 1*l.* each, in order to purchase from the old company its undertaking and assets for a consideration consisting of (*a*) 1,770,386 shares in the new company of 1*l.* each credited as paid up to the extent of 17*s.* 6*d.* per share, (*b*) the payment and satisfaction of the debts and liabilities of the old company, including the cost of liquidation; the old company was to go into voluntary liquidation and the liquidator was to offer the shares in the new company (credited with 17*s.* 6*d.* per share as paid up thereon), receivable as above, for distribution among the members of the old company at the rate of one of such new shares for each share in the old company held by such members; and in the event of any of the said members not accepting their due proportion of such shares within a time to be limited in such offer (not being less than fourteen days) the liquidator was to use his best endeavours to sell the shares not so accepted upon the best terms obtainable and distribute the net proceeds of such sale among the non-accepting members in proportion to the number of shares in the old company held by them respectively.

At an extraordinary general meeting of the old company held on January 24, 1908, for the purpose of considering the scheme in its original form a committee of shareholders was appointed to consider the position of the company, and the meeting was adjourned to February 7, 1908. At the adjourned meeting the report of the shareholders' committee was presented, and the meeting was again adjourned to February 13, 1908.

At the adjourned meeting held on February 13, 1908, the following resolutions were duly proposed and carried:—

"(1.) That the agreement proposed to be made between this company of the one part and Henderson's Transvaal Estates Limited (incorporated in Rhodesia) of the other part as amended be and the same is hereby approved.

"(2.) That the reorganization scheme submitted to this meeting as amended by the substitution of 1,770,386 shares of the new company of 1*l.* each (17*s.* 6*d.* paid) for a like number of

shares of 10*s.* each (7*s.* paid) be and the same is hereby approved.

"(3.) That it is desirable to wind up this company and accordingly Henderson's Transvaal Estates Limited be wound up voluntarily.

"(4.) That the liquidator of this company be and is hereby as from the date of his appointment authorized and required to offer 1,770,386 of the shares of the new company of 1*l.* each (credited with 17*s.* 6*d.* as paid up thereon) receivable under the above agreement for sale referred to in the reorganization scheme as amended as aforesaid for distribution among the members of this company at the rate of one of such new shares for each share in this company held by such members.

"(5.) That in the event of any of the said members not accepting their due proportion of such shares within a time to be limited in such offer (not less than fourteen days) the liquidator be authorized and required to use his best endeavours to sell the shares not so accepted upon the best terms obtainable, and to hold any net proceeds of such sale upon trust to distribute the same among the non-accepting members in proportion to the number of shares of this company held by them respectively."

The plaintiff was not present at this meeting either personally or by proxy.

At an extraordinary general meeting held on March 6, 1908, the resolution for voluntary winding-up was duly confirmed and a liquidator was appointed.

The new company having been incorporated on January 21, the agreement between the old company and the new company was executed on February 20. It provided—(1.) that the old company should sell, and the new company should purchase, all the undertaking, business, and property of the old company; (2.) that as part of the consideration the new company should undertake to pay and discharge all the existing debts and liabilities of the old company and the premiums on the debentures which, but for the liquidation of the old company, would become payable by them on March 31, 1908; (3.) that as a further consideration for the sale the new company, in the event of the passing of an effective resolution for the

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winding up of the old company within six calendar months of the date of the agreement, should pay the costs of the winding-up and dissolution; (4.) that as a further consideration for the sale the new company should allot to the old company, or at the old company's option to its nominees as therein mentioned, 1,770,386 shares of 1*l.* each in the new company credited with 17*s.* 6*d.* per share as paid thereon; (5.) that the old company should apply for or find substantial nominees, who should within two calendar months from the date of the agreement, or within such extended time as might be mutually agreed between the parties thereto, apply for and accept an allotment of the said shares, and pay 6*d.* per share on application and agree to pay 6*d.* per share on allotment, and the balance in calls to be made after the expiration of six calendar months from the first allotment, and that shareholders in the old company should be considered substantial for the purpose of this clause; (6.) that, in the event of the company failing to comply with the conditions of the last preceding clause with respect to any of the shares so to be applied for, the shares unapplied for should be at the disposal of the new company, and the old company should not be under any liability to become a member of the new company in respect of any of the shares; (8.) that the sale and purchase should be completed on March 6 then next.

In the meantime, namely, on February 14, 1908, the plaintiff issued the writ in this action, and on February 15 he served notice of motion for an injunction on the old company. The writ and notice of motion were subsequently amended by adding the new company as a party and in other minor particulars not material to be mentioned.

The motion came on for hearing before Eve J. on March 6. The learned judge refused the motion. Upon the question whether the reconstruction agreement was within the powers of the company, he said it was quite true, as alleged by the plaintiff, that this scheme of reorganization was both a device to extract further capital from the holders of fully-paid shares in the old company and a device to avoid paying to the non-assenting shareholders the full value of their interest; but that was equally true of most of these schemes, and, provided that those devices

were carried out within the powers of the company and in a manner which was not fraudulent or otherwise illegitimate, he recognized that the Court was bound to give effect to them; and in this case he held that the agreement, which was substantially identical with the agreement in *Fuller* v. *White Feather Reward, Ld.* (1), was not ultra vires. With reference to the proposed method of dealing with the shares in the new company which the shareholders in the old company refused to take up, he thought that the decision in *Burdett-Coutts* v. *True Blue* (*Hannan's*) *Gold Mine* (2), which was a decision upon a scheme under s. 161 of the Companies Act, 1862, afforded an indication of what, in the opinion of the Court, was the proper course to pursue with regard to the assets which were incapable of being distributed in specie, because, although in that case it was quite true that the shareholder had had an option of dissenting, at the time when the matter came before the Court that option had been lost, and therefore for all practical purposes the non-assenting shareholder was in exactly the same position as the non-assenting shareholder in this case, where he had not had the opportunity of dissenting under s. 161. In that position of affairs the Court of Appeal held that there was nothing inequitable or improper in providing by the scheme that the shares which were not claimed by the members who were entitled to take them should be sold and the net proceeds distributed rateably amongst the shareholders who had refused or neglected to take up their aliquot proportion. *In re Lake View Extended Gold Mine* (*Western Australia*), *Ld.* (3) was to the same effect. In his opinion those two cases were sufficient authority, apart altogether from *Fuller* v. *White Feather Reward, Ld.* (1), to justify him in arriving at the conclusion that this mode of dealing with the unclaimed shares was not illegal. *Fuller* v. *White Feather Reward, Ld.* (1) was no doubt at variance with *Bisgood* v. *Nile Valley Co.* (4); but, having regard to the conflict of authority between those two cases, he considered himself entitled to act upon his own view, and for the reasons above stated he held that the plaintiff was not entitled to an injunction

(1) [1906] 1 Ch. 823.
(2) [1899] 2 Ch. 616.
(3) [1900] W. N. 44.
(4) [1906] 1 Ch. 747.

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either in respect of the reconstruction agreement or in respect of the distribution of the resulting shares.

The plaintiff appealed.

P. O. Lawrence, K.C., and *M. J. L. Beebee*, for the plaintiff. A scheme for the sale of the undertaking of a company to a new company for partly-paid shares in that company, and the distribution of those shares among the members of the old company, cannot be forced upon the shareholders except under the provisions of s. 161 of the Companies Act, 1862. That section safeguards the interests both of the dissentient shareholders and of the creditors, but this scheme does neither. Under this scheme the unapplied-for shares, when sold by the liquidator, will realize practically nothing, and in substance this is a device to compel a fully-paid shareholder to subscribe further capital or give up his interest in the company. Further, the shares are to go direct to the corporator from the new company, and consequently there will be no assets available for payment of the debts of the old company except the proceeds of such part of the shares as may not be claimed. In effect this is a winding-up for the distribution of the assets, but not for the purpose of paying the debts. But assume that the liquidator has in hand a substantial fund arising from the sale of the unclaimed shares, he would have no answer to an action by a debenture-holder, and in that way the dissentient shareholder will be placed at a disadvantage as compared with the accepting shareholder; but the power to distribute shares in specie must be exercised for the benefit of all the shareholders, and not of some to the detriment of others. This scheme injures both the dissentient shareholders and the creditors, and it offends against s. 38, sub-s. 4, s. 133, sub-s. 10, and s. 161 of the Companies Act, 1862. As regards the cases under s. 161, *Griffith* v. *Paget* (1) shews that the distribution must be amongst all the shareholders according to their rights and interests; *In re City and County Investment Co.* (2) shews that the sale may be for partly-paid shares and that those shares may go direct to the members. *Higgs's Case* (3) shews that a shareholder cannot

(1) (1877) 5 Ch. D. 894. (2) (1879) 13 Ch. D. 475.
(3) (1865) 2 H. & M. 657.

be compelled to take the shares in the new company. Under s. 161 either a shareholder comes in fully, or he dissents and goes to arbitration or he does nothing and forfeits his shares. It follows that some time limit must be fixed within which the shareholder must exercise his option to take the shares, otherwise schemes under this section would be unworkable, and accordingly *Postlethwaite* v. *Port Phillip and Colonial Gold Mining Co.* (1) shews that a time limit may be fixed provided it is reasonable. That case also decides that a provision that the liquidator should sell the shares unapplied for and should account for any premiums to the shareholders who neither dissented nor exercised their option was valid, inasmuch as it was a provision for the benefit of the shareholders who did nothing and would otherwise have received nothing. *In re Lake View Extended Gold Mine (Western Australia), Ld.* (2) shews that where under a scheme under s. 161 the liquidator, in pursuance of the reconstruction agreement, sells the shares which have not been applied for and the agreement is silent as to the distribution of the proceeds of sale, such proceeds go to the shareholders who did not exercise their option because the shareholders who took up the shares had all that they bargained for. *Burdett-Coutts* v. *True Blue (Hannan's) Gold Mine* (3) decides that a shareholder who neither dissents nor exercises his option to take shares in the new company within the time limited by the scheme forfeits his interest, but that depends upon the principle that under s. 161 a shareholder is entitled to dissent and go to arbitration. The judgment of Eve J. proceeds upon a misapprehension of the two last cases, which have nothing whatever to do with a sale of the undertaking and scheme of reconstruction under the powers of the memorandum of association where the shareholder is bound to accept such compensation as the scheme offers.

Passing on to the cases of schemes for reorganization under the powers of the memorandum of association, in *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (4) Chitty J. decided that a sale of the company's undertaking under a valid power of sale contained in the memorandum of association

(1) (1889) 43 Ch. D. 452.
(2) [1900] W. N. 44.
(3) [1899] 2 Ch. 616.
(4) [1892] 3 Ch. 454.

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was not necessarily bad because a winding-up was contemplated. In *Payne* v. *The Cork Co.* (1) Stirling J. distinguished *Cotton's Case* (2) from that before him on the ground that in the latter the sale was in the winding-up. In *Doughty* v. *Lomagunda Reefs, Ld.* (3) Buckley J. (as he then was) followed *Cotton's Case.* (2) But in both those cases the sale was for fully-paid shares which became assets of the company, and there was nothing to prevent distribution of the assets in the usual way.

Wall v. *London and Northern Assets Corporation* (4), *In re Borax Co.* (5), and *In re H. H. Vivian & Co.* (6) were all cases of going companies in which debenture-holders tried to restrain the company from selling part of its assets and failed. Then in *Mason* v. *Motor Traction Co.* (7) Buckley J. (as he then was) decided that a sale of the assets of a company might be made under a power in the memorandum for partly-paid shares, but the question as to the distribution of those shares did not arise, and he refused to decide it.

[BUCKLEY L.J. There is nothing in that case inconsistent with your present argument.]

In *Manners* v. *St. David's Gold and Copper Mines* (8) Joyce J. and the Court of Appeal held that a scheme closely resembling that proposed in this case was a mere device to compel fully-paid shareholders to provide further capital or forfeit their shares and was void. It is true that, in that case, the proceeds of the sale of dissentient shareholders' shares were to be applied in payment of the company's debts, instead of being distributed among the dissentients; but in *Bisgood* v. *Nile Valley Co.* (9) Kekewich J. applied that decision in a case which is undistinguishable from the present. In *Fuller* v. *White Feather Reward, Ld.* (10) Warrington J. refused to follow *Bisgood* v. *Nile Valley Co.* (9), but he seemed to think that the case was covered by *Burdett-Coutts* v. *True Blue (Hannan's) Gold Mine* (11), although that was a case under s. 161, which is quite different. Neither Warrington J. nor

(1) [1900] 1 Ch. 308, 318.
(2) [1892] 3 Ch. 454.
(3) [1902] 2 Ch. 837.
(4) [1898] 2 Ch. 469.
(5) [1901] 1 Ch. 326.
(6) [1900] 2 Ch. 654.
(7) [1905] 1 Ch. 419.
(8) [1904] 2 Ch. 593.
(9) [1906] 1 Ch. 747.
(10) [1906] 1 Ch. 823.
(11) [1899] 2 Ch. 616.

Eve J. in the Court below fully appreciated the force of the decision in *Manners' Case.* (1) The reconstruction agreement and the resolutions for distribution are both, therefore, wholly ultra vires.

Gore-Browne, K.C., Stewart-Smith, K.C., and *H. E. Wright,* for the defendants. A reconstruction by allotting to shareholders partly-paid shares is often the only way of getting capital to save a company, and is therefore for the interest of all the shareholders. A man cannot be compelled to take shares in a company: *Higgs's Case.* (2) A power to distribute shares in specie implies a power to sell shares not accepted, or no such distribution could ever be made. The scheme is therefore intra vires. As far back as *Griffith* v. *Paget* (3) Jessel M.R. refused to stop a sale on the ground that the proceeds were to be distributed in a way then thought to be illegal. The plaintiff in this case is in the same position as the plaintiff in *Burdett-Coutts* v. *True Blue (Hannan's) Gold Mine* (4), and the principle of that case applies here.

Cotton v. *Imperial and Foreign Agency and Investment Corporation* (5) shews that it is competent for a company under the powers of its memorandum to sell its undertaking to another company for shares with a view to a winding-up and the distribution of the purchase consideration among its shareholders. This proposition has since come before the Court of Appeal in *New Zealand Gold Extraction Co.* v. *Peacock* (6), where the point is specifically dealt with by Davey L.J., who expresses a strong opinion that such a sale would be intra vires, in *Wall* v. *London and Northern Assets Corporation* (7), and in *Booth* v. *New Afrikander Gold Mining Co.* (8), where there is a dictum of Stirling L.J. in favour of the respondents; and, although the point did not actually arise for decision, in none of those cases did the Court throw any doubt upon Chitty J.'s decision. That decision has been standing for sixteen years and has been constantly acted on, and after so long a period this Court ought not

(1) [1904] 2 Ch. 593.
(2) 2 H. & M. 657.
(3) 5 Ch. D. 894.
(4) [1899] 2 Ch. 616.
(5) [1892] 3 Ch. 454.
(6) [1894] 1 Q. B. 622.
(7) [1898] 2 Ch. 469.
(8) [1903] 1 Ch. 295.

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now to disturb it and say that a sale by a company of all its assets in contemplation of a winding-up, assuming that it is authorized by the memorandum of association, is unlawful. The memorandum of association is the charter of the company, and if one of the objects of the company as defined in the memorandum is to sell its assets either for cash or shares, in order to invalidate such a sale the Court must find something in the Companies Acts to prohibit it. Among the objects of the company may properly be included what is to be done with the property and how it is to be divided when the time comes for the distribution of the assets. That remains binding on the people who have accepted the memorandum as their charter: *Doughty* v. *Lomagunda Reefs, Ld.* (1) Sect. 161 of the Companies Act, 1862, does not purport to be prohibitory; its object is not to prevent a company from doing something which it might otherwise do; but it is an enabling clause empowering the liquidator to sell for shares. *Manners* v. *St. David's Gold and Copper Mines* (2) is distinguishable, because the proceeds of the sale of the unclaimed shares were to go, not to the non-assenting members, who were entitled to them, but to the purchasing company. Eve J.'s definition of this scheme as a device to extract further capital from the fully-paid shareholders may be accepted, but that is not a reason for declaring the scheme invalid if it is not prohibited by the Companies Acts: *Salomon* v. *Salomon & Co.* (3)

Beebee in reply.

COZENS-HARDY M.R. We all think that the injunction must go, but we will give our reasons later.

April 3. BUCKLEY L.J. This is a case of the first importance. The question involved is whether by clauses even in the memorandum of association of a company limited by shares the limit upon the shareholder's liability can be raised—whether the constitution of the company can provide that the majority may impose upon the minority a scheme under which the member must either come under an increased liability or accept such compensation as the

(1) [1902] 2 Ch. 837. (2) [1904] 2 Ch. 593.
(3) [1897] A. C. 22.

scheme offers him. Sect. 161 of the Companies Act, 1862, protects the dissentient member by securing him the value of his interest to be determined by arbitration or agreement. The purpose of schemes such as that here in question is to evade or escape the provisions of that section. Their object is to impose upon the shareholders what is generally called an assessment—to require that in a limited company after the shares are fully paid the shareholder must either come under liability to make further contributions to capital or submit to take, not the value of his interest to be determined by arbitration or agreement, but such satisfaction as the scheme offers him. That satisfaction commonly means, and in substance means in this case, the surrender of his interest in the company.

The facts are as follows: Henderson's Transvaal Estates, Limited, which I will call the old company, was incorporated on August 10, 1894, as a company limited by shares with a memorandum of association, which includes amongst the objects of the company—(M.) to sell any property of the company for shares, whether fully paid or not; (O.) to amalgamate with any other company by sale or otherwise (for shares or otherwise) of the undertaking; (P.) to sell the whole or any part of the undertaking, business and property of the company for shares and to distribute any of the property of the company among the members in specie; and (Q.) to promote companies for the purpose of acquiring the properties of the company and to take and hold shares in such companies; each of these clauses (M.), (O.), (P.), and (Q.) extends to companies registered in South Africa. The articles of association include (article 131) a provision that in winding up the liquidator may, with the sanction of an extraordinary resolution, divide assets among the contributories in specie, and article 132 a provision (which is, however, illegal) that in case of a sale under s. 161 of the Companies Act, 1862, a dissentient shall not have the rights given to him by that section. In November, 1907, the issued capital of the old company consisted of 1,770,386 shares of 1*l.* each fully paid. The company was financially at the end of its resources. A scheme for obtaining further working capital by the issue of debentures was unsuccessful. In that state of facts a reorganization

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scheme was started on January 16, 1908, with the object of providing funds for debentures which were falling due on March 31, and for working capital. On January 16 notice was given for a meeting to be held on January 24 to vote upon the scheme. The meeting appointed a committee to look into the matter. The committee made certain recommendations by a report, dated February 7, with the result that the scheme was amended in certain particulars, and as amended is contained in the agreement presently stated. On February 13 the meeting, which had been convened for January 24 and adjourned to that day, met and passed resolutions which are shortly as follows: (1.) approving an agreement proposed to be made between the old company and a new company which had been incorporated in Rhodesia on January 21; (2.) approving the reorganization scheme as amended; (3.) resolving to wind up voluntarily; (4.) authorizing and requiring the liquidator to offer 1,770,386 shares of the new company of 1*l.* credited with 17*s.* 6*d.* receivable under the agreement presently mentioned for distribution amongst the shareholders at the rate of one new share for each share in the old company; (5.) authorizing and requiring the liquidator to use his best endeavours to sell shares which the members should not accept within a time to be limited (not less than fourteen days), and to hold the net proceeds of sale upon trust to distribute them among the non-accepting members. On February 14 the writ in this action was issued by the plaintiff, who is the holder of fifty fully-paid shares, asking an injunction to restrain the old company from carrying the reorganization scheme into effect. The writ was amended in particulars, which I need not stay to specify, and on March 6 Eve J. refused the plaintiff's motion for an injunction to restrain the carrying out of the scheme. From that order the present appeal is brought. In the interval, namely, on February 20, the agreement contemplated by the first resolution of February 13 was executed between the old and the new company. That agreement recites that the old company is empowered by its memorandum to sell its undertaking and to accept payment in shares, and provides—(1.) that the old company shall sell, and the new company shall purchase, all the undertaking, business, &c., of

the old company; (2.) that the new company shall pay the debts and pay the premiums on the debentures issued by the old company which, but for the liquidation of such company, would be payable by them on March 31, 1908; (3.) that the new company shall, if the old company within six months wind up, pay the costs of the winding-up; (4.) that the new company shall allot to the old company, or at the old company's option to its nominees, 1,770,386 shares of 1*l.* each in the new company credited with 17*s.* 6*d.*; (5.) that the old company shall apply or find substantial nominees who shall within two months apply for and accept an allotment for those shares and pay 6*d.* on application and agree to pay 6*d.* on allotment; and (6.) that in the event of the old company failing to comply with article 5 with regard to any of the shares the shares unapplied for shall be at the disposal of the purchasing company, and the old company shall not be under any liability to become a member of the new company in respect of any of those shares.

The question is whether the reorganization scheme contained in the agreement and resolutions is intra vires. The argument is that it is because it is justified by clauses in the memorandum of association.

Under the Companies Act, 1862, the incorporation of a company is effected by the registration of a memorandum of association which is to state the "objects for which the proposed company is to be established." To my mind that means the objects which the corporation during its corporate life is to pursue, the purposes by whose fulfilment it is to seek to earn profit. The definition of the objects is the definition of what is generally called the undertaking of the company. The modern practice is to add, but I think erroneously, an enumeration of powers for carrying those objects into effect. But, however that may be, the words "objects for which the proposed company is to be established" have, in my opinion, no relation to acts to be done after the corporate life has come to an end. So soon as the company passes into liquidation the distribution of its assets is a matter which concerns the corporation not at all, but its creditors and contributories only. In my judgment, it is no part of the function of the memorandum of association to define under the

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corporate objects the distribution of the assets after the corporate life is over.

The purpose of the memorandum and articles, however, is not confined to defining and limiting the purposes of the corporation; it extends also within proper limits to defining and ascertaining the rights of the corporators. I have no doubt that within proper limits the memorandum and articles may provide how, as between the corporators, the corporate assets shall be dealt with after liquidation. But in this, as in many matters, there are limits imposed by the statutes. There are matters in respect of which the constitution of the company cannot provide that the corporator shall not enjoy rights and immunities which the statute gives him. For instance, s. 82 of the Companies Act, 1862, empowers a contributory to present a winding-up petition. His right in that respect cannot be excluded by the articles: *In re Peveril Gold Mines.* (1) The issue of shares at a discount is illegal, and this not only in the sense that a less sum than 20*s.* in the pound cannot be limited to the injury of the creditor, but that, as between shareholders, provisions in the articles for the issue of shares at a discount remain illegal even after all creditors have been paid. In winding up a call may be made ultra the discount amount of the share for the adjustment of the rights of contributories amongst themselves: *Welton* v. *Saffery.* (2) "These companies," said Lord Macnaghten, "are the creature of statute, and by the statute to which they owe their being they must be bound in regard to shareholders as well as in regard to creditors in all matters coming within the conditions of the memorandum of association. Shareholders in these companies require protection just as much as creditors—perhaps even more." Upon a like principle the articles cannot exclude a shareholder from his right of dissent under s. 161 of the Companies Act, 1862: *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate* (3); *Payne* v. *The Cork Co.* (4) It is, therefore, not necessarily true that, because there are found in the memorandum and articles clauses such as those upon which the question here arises, that the

(1) [1898] 1 Ch. 122.
(2) [1897] A. C. 299, 324.
(3) [1899] 2 Ch. 80.
(4) [1900] 1 Ch. 308.

corporators as individuals are contractually bound by them. The question is not whether each individual corporator can bind himself in respect of his distributive share in the assets. The question is whether, consistently with the statutes, the constitution of the corporation can be such that every corporator shall in the matter of distribution—or a fortiori of distribution and further liability—be bound by the vote of the majority. The company as a company have no power to agree to provisions which reduce the shareholder's liability even inter socios below the nominal amount of the share (*Welton* v. *Saffery* (1)); nor, in my opinion, to provisions which increase his liability above that amount. The purpose of the memorandum and articles is to define the position of the shareholder as shareholder, not to bind him in his capacity as an individual. The definition of his position as shareholder must be a definition consistent with the statutes. A perusal of the opinions of the learned Lords in *Welton* v. *Saffery* (1), and particularly those of Lord Halsbury, Lord Macnaghten, and Lord Davey, will shew that these statements are well founded.

In the matter of liability upon his shares the statute provides in plain terms by s. 38, sub-s. 4, that in the case of a company limited by shares no contribution shall be required from any member exceeding the amount unpaid on his shares. In my opinion, any attempt so to define the constitution of the company as that the member shall in an event be liable for a larger sum is in breach of the statute and is ultra vires. Any clauses which can be used to maintain a scheme which imposes upon the member the alternative of accepting liability for a larger sum or of being dispossessed of his status as shareholder upon terms which he is not bound to accept are, I think, ultra vires.

When liquidation ensues, the scheme of the Act shortly is that the assets are to be turned into money, the contributions of the contributories enforced as far as need be, the debts paid, and the balance divided amongst the contributories according to their rights. Sect. 161 introduces a modification. That is a section which speaks not only after liquidation, but when the company is proposed to be, as well as when it is in the course of being,

(1) [1897] A. C. 299.

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wound up. The special resolution may be passed antecedently to or concurrently with the resolution for winding up. It is a section which enables the liquidator instead of converting the assets into money to exchange them for shares or like interests for the purpose of distribution amongst the members, but it safeguards the dissentient member by providing for the purchase of his interest at a price to be determined as mentioned in the Act of Parliament. The dissentient member being thus in a position, by taking proper steps, to obtain the value of his interest in the company, there is no hardship upon him in any of the following arrangements within reasonable limits: (1.) That the shares for distribution be partly-paid shares, or (2.) that if he wants the shares he must apply for them within a limited time, or (3.) that shares unapplied for are to be at the disposal of the new company, or (4.) that shares unapplied for may be sold and the member who does not assent shall take the proceeds (for this is giving him something more than that to which he would be otherwise entitled), or (5.) that the shares shall not go to the company and be assets of the company, but shall go direct to the members. It has accordingly been held that all these are legitimate in sales under that section. On the other hand, if there are dissentient members unpaid, the company may be put under an undertaking not to part with the assets until provision is made for them: *In re Hester & Co.* (1) And, further, the creditors are not injured, for under the last words of the section the sale is invalid if within a year a winding-up order be obtained. But none of these things are true if the sale be made, not under s. 161, but under clauses in the memorandum such as are here relied upon, for when the shareholder cannot obtain the value of his interest all the above are a hardship upon him. In substance he is placed in the position that he must either take the shares with the liability, take them within a limited time, and so on, or else find himself dispossessed of his proportionate share of the assets of the old company. And the creditor is injured, for the distribution of the shares direct to the members before the debts are paid leaves the creditor with nothing to look to but such part of the assets, if any, as goes to non-assenting members.

(1) [1875] W. N. 179; 44 L. J. (Ch.) 757.

Under s. 161 the creditor can stop the sale under the last words of the section; under the memorandum of association he cannot. Moreover, if the creditor resorts, as he naturally will in the first instance, to the last-mentioned assets, the non-assenting members will see those swept away by the creditors, while the assenting members have received and gone away with their shares. All this is wholly at variance with the right of the member who is not minded to take the new shares with the liability upon them. His right is to have the assets, including the shares in the new company, realized and applied first in payment of the debts, and then to have his proportionate share of the balance. These considerations lead irresistibly to the review of Chitty J.'s decision in *Cotton* v. *Imperial and Foreign Agency and Investment Corporation*. (1) He there held that a company might by proper clauses in its memorandum of association evade or escape the operation of s. 161. It is true that the agreement there was dated May 2, and the special resolution for liquidation was passed on May 4, but the notice of the meeting for May 4 must necessarily have been current on May 2, and the company must on May 2 have been one which, within the language of s. 161, was "proposed to be wound up voluntarily." The decision cannot fairly, I think, be regarded as resting in any way upon the difference between the dates of May 2 and 4. The decision affirmed that under clauses in the memorandum of association the company might sell its whole undertaking—meaning by that expression not merely all its assets at the moment, but all its present and future business—and might under the authority of special resolutions divide the proceeds of sale amongst the members without the safeguards provided by s. 161. With the greatest respect to that very learned judge, I am unable to agree with this decision. Sale of even all the property at a particular moment may be, but sale of the whole undertaking and division of the proceeds cannot be, a corporate object. Under a clause in its memorandum of association a single steamship company may no doubt sell its only steamship with the whole of its equipment and with the proceeds buy another. But under a clause in its memorandum of

(1) [1892] 3 Ch. 454.

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association it cannot, in my opinion, sell its only steamship and all its undertaking and divide the proceeds. Distribution of capital (except in reduction of capital) can only be made in winding up. An agreement for sale may be a corporate act of the going company and within its objects, but an agreement for sale and distribution can only be valid when the company "is proposed to be wound up" or is in course of being wound up. When the company is proposed to be wound up or is in course of being wound up s. 161 contains provisions which, in my judgment, define rights in the members which cannot by any clauses in the memorandum and articles of association be excluded. If the company is proposed to be wound up and the transaction is a sale and distribution, then, in my opinion, the statute provides that sale by conversion into money may be replaced by exchange for shares upon the terms, but only upon the terms, of complying with the provisions of s. 161. It has been decided, as mentioned above, that part of s. 161, namely, the right of the member to dissent, cannot be excluded by the articles, but the argument before us is that the whole of s. 161 may be excluded. I think not. In my judgment the basis and reasoning of the decision in *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (1) cannot stand consistently with principle or with the reasoning of the subsequent decision of the House of Lords in *Welton* v. *Saffery*. (2)

We have been referred to some cases in the Court of Appeal since 1892 in which the decision in *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (1) was referred to; and there are others. In none of them did the question of the correctness of the decision really arise, and in none of them was that case adopted or affirmed by the Court of Appeal. Mr. Gore-Browne pressed us with Davey L.J.'s words in *New Zealand Gold Extraction Co.* v. *Peacock*. (3) The answer is easy. The action was for calls, and all that was decided was that the old company possessed, and had validly exercised, its power to make a call. The scheme did not impose upon Peacock the

(1) [1892] 3 Ch. 454. (2) [1897] A. C. 299.
(3) [1894] 1 Q. B. 622.

liability to pay more than the 20*s.* payable upon his shares. The only question was whether his executors were right in saying that he was not liable to pay so much. It is only fair to say that in *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (1) the shares in the new company were fully-paid shares, so that the particular iniquity of using the memorandum for the purpose of imposing an assessment did not arise. Had the case contained that additional feature it may be that Chitty J. would not have gone as far as he did. But apart from that feature and upon the general question, I cannot agree with the decision. Moreover, it is, I think, inconsistent in principle with the subsequent cases, such as *In re Peveril Gold Mines* (2) and *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate* (3) in this Court, and with *Welton* v. *Saffery* (4) in the House of Lords. It has never been considered and approved in this Court, and, on the contrary, *Manners* v. *St. David's Gold and Copper Mines* (5) is, I think, inconsistent with it. That case is an authority for the proposition that an agreement, whose effect is that, if the member does not choose to accept a further liability, his share of the assets shall be forfeited and handed over to the purchasing company, is ultra vires; that any device which compels the member to find further money or to forfeit his interest is bad. Kekewich J. in *Bisgood* v. *Nile Valley Co.* (6) followed the same principle. I think *Bisgood* v. *Nile Valley Co.* (6) was rightly decided. It follows that *Fuller* v. *White Feather Reward, Ld.* (7), in my opinion, was wrong.

In *Doughty* v. *Lomagunda Reefs, Ld.* (8) I followed, as I was bound as a judge of first instance to follow, *Cotton* v. *Imperial and Foreign Agency and Investment Corporation.* (1) In so doing I said all I properly could to invite an appeal, hoping that the Court of Appeal might see its way to do what I could not do and consider whether *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (1) was rightly decided. Unfortunately the appeal went off on another point, and my decision, to my

(1) [1892] 3 Ch. 454.
(2) [1898] 1 Ch. 122.
(3) [1899] 2 Ch. 80.
(4) [1897] A. C. 299.
(5) [1904] 2 Ch. 593.
(6) [1906] 1 Ch. 747.
(7) [1906] 1 Ch. 823.
(8) [1902] 2 Ch. 837.

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regret, was affirmed without argument. In the present case it is necessary to say whether *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (1) was rightly decided or not. I feel bound to express the opinion that it was not. I prefer to decide this case upon the broad ground, and not upon any detail in the particular facts of the scheme in this case.

At the same time there is here an additional feature which should not be left without mention. The new company is one formed in Rhodesia under the Rhodesia Company Ordinance, so that under this scheme the corporator in the English company is to find himself a corporator with an increased liability in a company formed and residing, not in this country, but in South Africa and under another law. The fact that clauses (M.), (O.), (P.), and (Q.) of the memorandum of association extend to companies registered in South Africa does not wholly cover this point. The plaintiff is a person who, as the holder of fully-paid shares, finds that he must either take the like number of shares in the Rhodesian company with a liability of 2*s.* 6*d.* upon them or accept such benefit, if any, as comes to him under the agreement and resolutions. The company, it is true, have issued the allotment letters in such form as that the shareholder could sell his right to an allotment and put forward the name of a purchaser if he found one. And the old company could within the language of the agreement sell the shares which are not applied for, and under the fifth resolution the proceeds would be distributable among the non-assenting members. Shortly stated, the scheme is one under which the shareholder is told that he may take the share in the new company with its liability or sell the share in the new company with its liability, but he shall have nothing but the share in the new company or its proceeds; that he must be assessed or find some one who will take the new share with the assessment or take his chance that the liquidator may find some one who will do so, but that he shall have nothing else. In my opinion this is ultra vires. The plaintiff is, in my judgment, entitled to an injunction to restrain the defendants from carrying out the reorganization scheme.

(1) [1892] 3 Ch. 454.

COZENS-HARDY M.R. I have read the judgment delivered by Buckley L.J.; I agree with it, and I do not feel that I can with advantage add anything to it.

FLETCHER MOULTON L.J. I am of the same opinion.

Beebee. Will your Lordships say what will be the effect of the judgment upon the resolution for voluntary winding up?

BUCKLEY L.J. We decline to express any opinion upon that point.

Solicitors: *Hatchett Jones, Bisgood & Marshall; Ashurst, Morris, Crisp & Co.*

H. B. H.

THOMSON *v.* HENDERSON'S TRANSVAAL ESTATES, LIMITED.

[1908 T. 569.]

Company—Winding-up—Validity—Contemporaneous Resolutions for a voluntary Winding-up and Reconstruction Scheme—Invalidity of Scheme.

A resolution for a voluntary winding-up is not invalid by reason of its being passed contemporaneously and in concert with resolutions for a reconstruction scheme which are held to be invalid.

Dictum of Turner L.J. in *In re Imperial Bank of China, India and Japan*, (1866) L. R. 1 Ch. 339, 347, explained and distinguished.

Cleve v. *Financial Corporation*, (1873) L. R. 16 Eq. 363, approved.

MOTION.

This action was brought by a shareholder in the defendant company, suing on behalf of himself and all other shareholders, for a declaration that a resolution passed at an extraordinary general meeting of the company held on January 24, 1908, and confirmed at an extraordinary general meeting held on March 6, 1908, for the voluntary winding up of the company, and a resolution passed at the last-mentioned meeting appointing the defendant J. D. Pattullo liquidator of the company, were invalid and that the company was not in liquidation, and for an injunction restraining the defendant Pattullo from acting as such

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liquidator and from dealing with the assets of the company. The defendant company in this action was the first-named defendant company in the action of *Bisgood* v. *Henderson's Transvaal Estates, Ld.* (1), and the object of this action was to determine the question whether the decision of the Court of Appeal in the preceding case, declaring the reconstruction scheme and the resolutions relating thereto invalid, affected the validity of the resolution for the voluntary winding up of the company.

The notice convening the meeting of January 24, 1908, was issued on January 16. It enclosed an outline of the scheme for reorganization, and stated that the meeting was to be held "for the purpose of considering the enclosed reorganization scheme and, if thought fit, passing the subjoined resolutions, with or without modification":—

"1. That the agreement proposed to be made between this company of the one part and Henderson's Transvaal Estates Limited (incorporated in Rhodesia) of the other part be and the same is hereby approved.

"2. That the reorganization scheme submitted to this meeting be and the same is hereby approved.

"3. That it is desirable to wind up this company and accordingly that Henderson's Transvaal Estates, Limited, be wound up voluntarily.

"4. That the liquidator of this company be and is hereby, as from the date of his appointment authorized and required to offer 1,770,386 of the shares of the new company of 10*s.* each (credited with 7*s.* as paid up thereon) receivable under the above agreement for sale referred to in the reorganization scheme for distribution among the members of this company at the rate of one of such new shares for each share in this company held by such members.

"5. That in the event of any of the said members not accepting their due proportion of such shares within a time to be limited in such offer (not less than fourteen days), the liquidator be authorized and required to use his best endeavours to sell the shares not so accepted upon the best terms obtainable, and to hold any net proceeds of such sale upon trust to distribute the

(1) Ante, p. 743.

same among the non-accepting members in proportion to the number of shares of this company held by them respectively."

The notice further stated that resolutions 4 and 5 would be submitted as extraordinary resolutions, and that resolution 3, if duly passed, would be submitted for confirmation as a special resolution at a subsequent extraordinary general meeting.

The first extraordinary general meeting above referred to was duly held on January 24, but it was adjourned, first to February 7 and then to February 13, with a view to the scheme being amended. On the last-mentioned date the resolutions mentioned in the notice were passed subject to certain modifications in the reorganization scheme as shewn in the preceding report; and at an extraordinary general meeting held on March 6 the winding-up resolution was duly confirmed and the defendant Pattullo was appointed liquidator.

The action came on on April 10, 1908, upon motion for an injunction to restrain the defendant Pattullo from acting as liquidator and from intermeddling with the assets of the company.

P. O. Lawrence, K.C., and *Arthur Sims*, for the plaintiff.
Gore-Browne, K.C., and *H. E. Wright*, for the defendants.

EVE J. This motion raises a short point, and one which, I think, so far as I am concerned, is covered by authority. [His Lordship referred to the writ and the notice of motion, and continued :—] In short, what the plaintiff seeks is a declaration that by reason of its association with certain other resolutions to which I will refer the resolution by which the company was put in voluntary liquidation is void. The other resolutions were four in number. The first, which was the first in order of the resolutions to be put to the meeting, was to approve a provisional agreement which had been entered into for the sale of the company's undertaking and assets to a new company incorporated in Rhodesia; the second was that the reorganization scheme submitted to the meeting, and which was given effect to in the provisional agreement, should be approved; and the other two had reference to directions to be given to the

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liquidator as to the procedure to be adopted for giving effect to the agreement and the reorganization scheme thereby contemplated.

The Court of Appeal has held that the four resolutions with which the resolution to wind up was associated were each and all invalid and ultra vires, and the plaintiff here contends that, inasmuch as the winding-up was constituted not because the company was in extremis, but in order to give effect to this scheme of reconstruction, now that the scheme has been held to be ultra vires and invalid, the winding-up resolution ought in the same way to be treated as invalid and of no effect.

The action is brought, and the motion is founded on, a dictum—I do not think I can say a decision—of Turner L.J., to which frequent reference has been made in the course of the argument. It is to be found in the case of *In re Imperial Bank of China, India and Japan.* (1) In that case the Lord Justice was considering an application in the voluntary winding up of the company by a contributory, who alleged that the amalgamation contemplated when the winding-up was resolved upon was an amalgamation which ought not to be given effect to. The first point which the Lord Justice had to deal with was this, that he had not before him certain parties necessary for determining the question whether the amalgamation was proper or not, and he declined to decide the question against them in their absence. He had further to consider how the applicant could impeach the amalgamation by legal proceedings, and while considering how that could best be done he delivered himself of the dictum which has been so much discussed. He said (2): "If the resolutions for the voluntary winding up of this company had stood apart from the amalgamation I should have thought that the petition ought to have been dismissed upon this point also"—that is to say that, if there was a valid winding-up constituted apart altogether from the resolution bringing about the amalgamation, the plaintiff had no equity to come to the Court and ask that that voluntary winding-up should be superseded by a compulsory order. Then he goes on: "But the resolutions for winding up the company voluntarily, and for amalgamation, are plainly

(1) L. R. 1 Ch. 339. (2) L. R. 1 Ch. 347.

parts of the same transaction, and if the resolution cannot stand as to one part of the transaction, neither, I think, can it stand as to the other part of it; and if it cannot stand as to either, the petitioners, as it seems to me, will have a sufficient case for an order to wind up this company compulsorily." Now it is to be observed that the learned Lord Justice there drops into the singular when he is making reference to the resolutions, treating the separate resolutions for winding up and for amalgamation as one and the same. He says: "If the resolution cannot stand as to one part of the transaction, neither, I think, can it stand as to the other part of it."

As has been pointed out in all the subsequent cases in which this observation has been discussed, the order which the Lord Justice made recognized the voluntary winding-up as still subsisting, because it was in the winding-up that he gave the applicant permission to use the name of the liquidator for taking such proceedings as he might be advised with a view to obtaining the relief which he was unable to obtain on that application. Now it is quite true that in that case the Court had not determined that the amalgamation scheme was ultra vires of the company, that point being left open. The same observation applies with even greater force to the case next in order of date—*In re Irrigation Co. of France*. (1) Two things distinguish that case from the present. In the first place, the liquidation there was recognized by all parties as inevitable; and, in the second, the Court did not hold that the resolutions with which the resolution for voluntary winding up was associated were ultra vires, but on the contrary held them to be intra vires. In these circumstances the Lords Justices criticized the observation of Turner L.J. to which I have referred, but each of them added that the case then under consideration could be differentiated from the case before Turner L.J., first, in respect of the liquidation being necessary; and secondly, in respect of the fact that in the case then before the Court the decision was that the transaction sought to be impeached was intra vires of the company, whereas in the case before Turner L.J. that point was left open. But subject to those qualifications it does appear to me, especially having regard to

(1) (1871) L. R. 6 Ch. 176.

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the judgment of Mellish L.J., that the Court of Appeal were not prepared to adopt as a true exposition of the law the statement of Turner L.J. that a resolution for a voluntary winding-up was necessarily bad if associated with other resolutions which were held to be invalid. The matter next came up for consideration before Bacon V.-C. in *Cleve* v. *Financial Corporation*. (1) It was pressed upon the Vice-Chancellor, first, that he was bound by the dictum of Turner L.J.; and secondly, that in a case affecting the very company with which he was dealing—*Clinch* v. *Financial Corporation* (2)—the question had been concluded by a judgment of the Court of Appeal declaring the whole series of resolutions bad because those which dealt with the particular scheme were held to be bad. The Vice-Chancellor repudiated his being bound by one or the other. He pointed out quite clearly and conclusively that the judgment in *Clinch* v. *Financial Corporation* (2) in no way bound him, and then he quoted the passage in Turner L.J.'s judgment in *In re Imperial Bank of China, India and Japan* (3), and dealt with it in language which I adopt because it expresses in far better terms than I can ever hope to express it the opinion at which I have arrived with regard to that passage. He said: "But when the case comes to be examined, although those expressions did fall from the learned judge, he adopts the voluntary winding up as an existing thing, treats it as an existing thing, which was and had been an existing thing until the compulsory winding-up order was made. The conclusion of the judgment is, that the petitioners were to be at liberty to make out a case if they could for a compulsory winding up, which order, if it was made, would supersede the voluntary winding-up order. And that is the whole scope of the judgment. In my opinion, notwithstanding the passage which I have read, and it is the strongest that can be found in that case, the decision does not in the slightest degree support the notion that because a company, at a duly convened meeting, having in their contemplation two objects, one of which they could accomplish, and the other they could not, resolve to do both, they cannot do either, because

(1) L. R. 16 Eq. 363. (2) (1868) L. R. 4 Ch. 117.
(3) L. R. 16 Eq. 378.

they cannot do one. It is a strange sort of reasoning, and I am quite sure that, looking at the case and the ultimate judgment upon it, that cannot have been the decision of the learned Lord Justice Turner. There is no ground that I know of upon which it can be said that the business of joint stock companies should be so hampered and interfered with as that, after they have come to a resolution to wind up, upon a mere cavil, upon mere special pleading, upon mere spelling out of bits of Acts of Parliament, and more or less of judgments upon other subjects, their deliberate and serious resolutions shall be interfered with, and the transactions of years shall be undone." The Vice-Chancellor also pointed out, what was an element in that case, but which certainly does not exist in this, that the applicant was coming at a very late date to upset a state of things which had been in existence for many years.

Now, having arrived at that conclusion, and adopting that judgment as expressing my own views on the subject, it is suggested that there are two later cases which are inconsistent with that judgment being really expositive of the law as it exists to-day. Those are *In re Teede & Bishop, Ld.* (1), and *In re Gutta Percha Corporation* (2), both decided by Cozens-Hardy J. In approaching the consideration of those two cases it is, I think, most material to have regard to the observations of Cotton L.J. in *Stone* v. *City and County Bank.* (3) The Lord Justice, in dealing with this question of the right to invalidate a voluntary winding-up on the ground of its association with resolutions for purposes ultra vires, says this (4): "The plaintiffs' counsel have argued that the winding up is a nullity: but there is a distinction between its being voidable and its being a nullity: possibly the points urged in their behalf may form good reasons for inducing the Chancery Division, on a petition for winding up compulsorily, to supersede the voluntary winding up, and to make an order for a compulsory winding up; but that is not a matter before us, and I think it is impossible to say that the voluntary winding up is a nullity; for a general meeting has passed valid resolutions for that purpose." I think that those observations are most instructive

(1) (1901) 84 L. T. 561.
(2) [1900] 2 Ch. 665.
(3) (1877) 3 C. P. D. 282.
(4) 3 C. P. D. 312.

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when one comes to consider these two judgments of Cozens-Hardy J. *In re Teede & Bishop, Ld.* (1), I think, has no application to the present circumstances. There the directors had issued a notice of a meeting to be held for the purpose of passing certain specific resolutions, the first of which was in these terms: "That a reconstruction of the company is desirable, and that the company be therefore wound up voluntarily, and that Mr. William Henry Pannell"—giving his address—"be and he is hereby appointed liquidator for the purpose of such winding up, and that the remuneration of the said liquidator for his services be fixed at the sum of 105*l.*" Then followed two other resolutions with reference to the proposed reconstruction. That notice having been issued, the meeting was held, and not one of the resolutions the intention to move which was stated in the notice was moved, but a wholly different resolution was put to the meeting, namely: "That the company be wound up voluntarily, and that Mr. William Henry Pannell, of 13 and 14 Basinghall Street, London, E.C., chartered accountant, be and he is hereby appointed liquidator for the purpose of such winding up." When the shareholder who subsequently presented a petition became aware of what had been done at the meeting, he came to the Court and alleged that a resolution was passed in respect of which no notice was given, the meeting having been convened for the purpose of passing a wholly different resolution; and one is not surprised to find that the Court came to the conclusion that the resolution was invalid on the ground that no notice of the intention to pass it had been given and that the shareholders were entitled, having regard to the notice which had been given to them, to treat it as a nullity. I do not think that that decision, when fully understood, affects this question at all. In *In re Gutta Percha Corporation* (2) a petition was presented by a fully-paid shareholder for a compulsory winding-up order, and the learned judge held, not that a voluntary winding-up had not been constituted, not that the whole proceedings were invalid, but that in view of the fact that the resolution had been passed in association with resolutions which, though perfectly valid, had ultimately failed, the voluntary winding-up did not, as in ordinary circumstances it would, prevent

(1) 84 L. T. 561 (2) [1900] 2 Ch. 665.

the fully-paid shareholder from asking for a compulsory order, and, inasmuch as the petitioner brought to the notice of the Court circumstances which required investigation, the learned judge made the order. It seems to me that that is just one of those cases which Cotton L.J. had in his mind, where the Court, not being able to treat the voluntary winding-up as a nullity, could nevertheless take into consideration the circumstances under which it had been constituted and declare that those circumstances were a sufficient ground to entitle a fully-paid shareholder to obtain a compulsory order. Having come to a clear conclusion that this resolution has been fairly and validly passed, I must refuse this motion.

C. A.

The plaintiff appealed. The appeal was heard on April 11, 1908.

P. O. Lawrence, K.C., and *Arthur Sims*, for the plaintiff. The question has never been before the shareholders, Aye or No, shall there be a winding up—that is to say, except as part of the scheme for reconstruction. Although the notice convening the general meeting mentioned several resolutions, the meeting was really convened to consider what was in substance one transaction, and the resolution for voluntary winding up ought to stand or fall with the other resolutions: *In re Teede & Bishop, Ld.* (1); *In re Imperial Bank of China, India and Japan.* (2) No doubt the dictum of Turner L.J. has been distinguished in cases where the resolutions were intra vires but irregular, but here the resolutions have been held to be ultra vires. *Cleve* v. *Financial Corporation* (3) is distinguishable, having regard to the great lapse of time before the application was made.

Gore-Browne, K.C., and *H. E. Wright*, for the defendants.

Cozens-Hardy M.R. This, no doubt, is a question of some importance, but I cannot honestly say that I think it is a question of any difficulty. We have here an admitted fact that resolution No. 3 was passed and confirmed by the requisite majority, that

(1) 84 L. T. 561. (2) L. R. 1 Ch. 339, 347.
(3) L. R. 16 Eq. 363.

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resolution being "That it is desirable to wind up this company, and accordingly that Henderson's Transvaal Estates, Limited, be wound up voluntarily." It seems to me that there is no possible ground for impeaching that, subject to the question whether the notice to the shareholders was sufficient to cover such a transaction. That is a mere question of looking at the notice which was given, and on reading that notice it seems to me plain that the shareholders were told that five separate resolutions would be proposed at the meeting, any one of which they might pass without reference to any other of them, and that, in fact, it would not have been competent to the chairman, if Nos. 1 and 2 had been rejected, to decline to put No. 3 to the meeting. In other words, I cannot bring myself to say that there is any ground for holding that these five resolutions are to be regarded as one, or as so interdependent that you cannot reject one and pass the others. That, apart from authority, is my view of the whole case. I find here a perfectly clear and unambiguous notice that this resolution would be proposed. That resolution was passed and confirmed. It is perfectly true that other resolutions were passed which have been held to be ultra vires, but treating this as a matter of first impression, I see no ground for holding that these resolutions were so linked together that No. 3 must fall with Nos. 1, 2, 4, and 5.

Now, is there any authority to the contrary? First of all Mr. Lawrence pointed to a decision of my own—*In re Teede & Bishop, Ld.* (1) I see no reason whatever for doubting that decision. It proceeded upon the ground that there was no good notice of intention to pass the resolution to wind up, except as linked with and as part of the others. That is just what we do not find in the present case. Then it is said that there is a dictum of that very great judge Turner L.J., for it is only a dictum, which lends some colour to the appellant's contention. He says: "But the resolutions for winding up the company voluntarily, and for amalgamation, are plainly parts of the same transaction, and if the resolution cannot stand as to one part of the transaction, neither, I think, can it stand as to the other part of it; and if it cannot stand as to either, the

(1) 84 L. T. 561.

petitioners, as it seems to me, will have a sufficient case for an order to wind up this company compulsorily." That was merely a dictum, because a compulsory order was made in that case, and when that order was made the Court adopted the winding-up and treated it as an existing thing. The matter came again before Bacon V.-C. in *Cleve* v. *Financial Corporation.* (1) The Vice-Chancellor puts the matter very forcibly. Referring to the dictum of Turner L.J. he says: "In my opinion, notwithstanding the passage which I have read, and it is the strongest that can be found in that case, the decision does not in the slightest degree support the notion that because a company, at a duly convened meeting, having in their contemplation two objects, one of which they could accomplish, and the other they could not, resolve to do both, they cannot do either, because they cannot do one." That seems to me to be perfectly logical, perfectly clear, and perfectly correct.

I agree with the decision of Eve J. that there is no ground for saying that this company is not now in the course of being wound up, or that its status has not been changed. This appeal, therefore, must be dismissed.

Fletcher Moulton L.J. I am of the same opinion, and for the same reasons. I will only add this: In my opinion the most important corporate act that a company can do is to pass a resolution for voluntary winding-up, because that initiates the closing-up of its corporate existence. Now the statute has prescribed the formalities which must be taken in order that so important a resolution may be validly passed. There is no question here that they have all been complied with, and a resolution has been passed by the company simpliciter which, if it is effective, shews that the corporators have resolved to put an end to its corporate existence. I think it would be pessimi exempli for us to allow a doubt to be cast upon this formal performance of this important act by a suggestion that before treating it as valid the Court is to consider what must be supposed to have been in the minds of the people who received the notice and voted upon the resolution, the sole ground suggested

(1) L. R. 16 Eq. 378.

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being that this resolution, although a separate resolution, is included in the notice in common with resolutions relating to other things. For my part I could not be a party to a decision which approved any such doctrine.

BUCKLEY L.J. By incorporation under the Companies Acts a company is constituted with a certain status. It is an incident of its existence, that if it passes a certain resolution its status is altered. If it passes a winding-up resolution it ceases to be a company—a going company, as it is called—and becomes a company in liquidation.

I am willing to assume here that when the shareholders came to this meeting they came with the intention of voting upon a particular scheme which was proposed and in favour of a winding-up which was to be the means of carrying that scheme into effect—that they had in view a certain purpose in passing the winding-up resolution.

The general question I may state thus: Assume that by fraud or mistake, or for a purpose which fails, status has been altered, does the status revert to that which it was before? In my opinion, certainly not. Many illustrations of that might be put. If a woman, for a purpose which fails, does in fact marry, her status is altered, and the fact that she has done it for a purpose and that that purpose cannot be achieved will not make her a single woman again. If a man, by fraud, mistake, or for a purpose that fails, changes his nationality and takes the oath of allegiance to a foreign sovereign, the fact that he has been deceived will not restore his prior status. To my mind, there is nothing in the point that the step in the present case has been taken—that the resolution to wind up has been passed—with a view to a purpose which cannot be carried into effect.

This meeting was convened by a notice which specified its business to be to consider, and if thought fit to pass, the resolutions numbered 1, 2, 3, 4, and 5. It was the duty of the chairman at that meeting, if requested to do so, to put each of those resolutions separately. Absentees would become bound by the result of the meeting if, but only if, it was thus properly conducted. Whether 1 and 2 had been affirmed or negatived, 3 was

properly business to be put before the meeting, and when the meeting came to vote upon resolution No. 3 they did, by affirming that resolution, alter the status of the company, irrespective of the question whether what they had resolved under 1 and 2 could be carried out or not. That, as it seems to me, is how the matter rests on principle.

But we are told that there are authorities which touch the point. The passage which has been principally relied upon is a passage from the judgment of that very great judge Turner L.J. in *In re Imperial Bank of China, India and Japan.* (1) Speaking for myself, I think that his language has been misunderstood. I am going to read it for the purpose of pointing out what, as I think, was his meaning—a meaning which is in no way in conflict with what I am saying. The question before the Court was whether, the company having purported to go into voluntary liquidation, there should or should not be a compulsory order. Two dissentient shareholders impeached the amalgamation and prayed for a winding-up order or a supervision order. This is the language of the learned Lord Justice : "If the resolutions for the voluntary winding up of this company had stood apart from the amalgamation I should have thought that the petition ought to have been dismissed upon this point also." That means, "If the domestic forum of the shareholders had really expressed their wishes in favour of a voluntary winding-up apart from the amalgamation I should have thought that the petition of a shareholder asking for a compulsory order ought upon that ground to be dismissed, because the corporators had resolved upon a voluntary winding-up." In that case and for that purpose the question whether the resolution was passed with a view to a particular purpose or not would have been material. Then he goes on: "But the resolutions for winding up the company voluntarily, and for amalgamation, are plainly parts of the same transaction, and if the resolution cannot stand as to one part of the transaction, neither, I think, can it stand as to the other part of it." That means that, inasmuch as the domestic forum voted for voluntary liquidation upon the footing that there was going to be an amalgamation, it was consistent

(1) L. R. 1 Ch. 339, 347.

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that when there was not going to be an amalgamation a shareholder should come to the Court and say, "Give me a compulsory order, because, although I admit that the voluntary winding-up is valid, yet it has been brought about under a misapprehension." That, it will be found, is the effect of his concluding words—"and if it cannot stand as to either, the petitioners, as it seems to me, will have a sufficient case for an order to wind up this company compulsorily." In other words, the Lord Justice was saying, Here is a valid voluntary liquidation, but obtained, so it is said, under such circumstances that a compulsory order ought to be made to replace it.

Now let me say under what circumstances, to my mind, the language of the Lord Justice would be applicable. The present appellant might, if he had so chosen, instead of taking the proceedings which he has taken, have applied under s. 89 for an order to stay the voluntary winding-up. Upon that application it might be—I do not say it would be—that if he had succeeded in shewing the Court that the majority of the contributories had voted for voluntary winding up in an event, and that that event could not be achieved, there ought to be a stay of the winding-up proceedings. There the Lord Justice's language would have been applicable. In the case before us it seems to me it is not applicable.

That my construction is right is shewn, I think, by the form of the order which the Court made. The Court proceeded on the footing that there was a valid voluntary winding-up, because leave was given to the parties to take such proceedings as they might be advised for impeaching the amalgamation, and if they should be so advised to use the name of the company or of the liquidators in such proceedings. To my mind the case of *In re Imperial Bank of China, India and Japan* (1) is no authority at all for the proposition that a winding-up resolution which has been passed in concert with and contemporaneously with other resolutions which cannot be carried into effect is in itself invalid. The status of the company has been altered by that resolution, and it cannot be altered back by the fact that other resolutions have been joined with it.

(1) L. R. 1 Ch. 339.

The only other point is this. If it were shewn that, while the meeting had been convened to consider certain resolutions, different resolutions were submitted at the meeting, then upon a totally different ground the resolution passed would not be valid. If a meeting be convened by a notice whose form does not justify a resolution to wind up, a resolution to wind up cannot be passed at that meeting, because the parties have not come there for that purpose. That is a point which does not arise in the present case.

I say nothing about the decision in *In re Teede & Bishop, Ld.* (1), except that in that case Cozens-Hardy J. proceeded upon the footing that the notice did not justify the resolution, and, if so, there was no resolution, because the meeting was not convened for that purpose.

Upon this form of notice it seems to me that the resolution was perfectly good. There was a meeting convened to consider, amongst other resolutions, No. 3, "That it is desirable to wind up this company, and accordingly that Henderson's Transvaal Estates, Limited, be wound up voluntarily," and it affirmed that resolution. To my mind that was perfectly good. The order of the learned judge was, I think, quite right, and this appeal ought to be dismissed.

Solicitors: *Parker & Richardson; Ashurst, Morris, Crisp & Co.*

(1) 84 L. T. 561.

H. B. H.

JOYCE J
1908
Feb. 4, 5, 15.

PEARCE *v.* BULLARD, KING & CO.

[1907 P. 205.]

Bankruptcy—Adjudication—Secured Creditors—Proof—Lumping Debts and Securities—Aggregate assessed Value—No separate Assessment—Shares in Ships—Vendor's Lien—Admission of Proof—Composition—Annulment of Bankruptcy—Revesting—Debtor's Right to Redeem.

The plaintiff was adjudicated bankrupt on August 26, 1899. The defendants, who had various debts and various securities, sent in their proof as secured creditors, lumping together their debts and securities and claiming to prove for the balance. The trustee admitted the proof without separating the debts or having the separate value of the several securities assessed in the proof. Subsequently a scheme for composition was approved, and on payment of the composition the bankruptcy was annulled on March 6, 1901, and the outstanding estate of the plaintiff ordered to revest in him. In January, 1907, the plaintiff commenced an action for redemption of the securities:—

Held, that at and previous to the composition the estate of the plaintiff had, with regard to the proof, formed a security to the defendants, having regard to the value of their securities, and that they held them for the aggregate assessed value at time of action brought, and had nothing more than a security then on the securities upon payment that the plaintiff was entitled to redeem and of interest from the date of proof.

Quære whether, apart from the special circumstances of the case, the defendants were in strictness secured creditors in respect of their vendors' lien for the unpaid purchase-moneys of shares in ships, which shares had been sold by them to the plaintiff but still remained registered in their names and had never been transferred by them; and whether these were secured debts.

ACTION.

At the date of the receiving order hereinafter mentioned the plaintiff was indebted to the defendants for (among other debts partly secured and partly unsecured) unpaid purchase-moneys under three uncompleted contracts for sale by the defendants to the plaintiff of one sixty-fourth share in each of the steamships *Umfuli*, *Umtali*, and *Umvoti*, and also for principal and interest, 1898, secured by an indenture of mortgage dated December 2[illegible] mortgaged upon certain life policies, one of which had already been [illegible]n, in

Devonshire. The mortgage deed provided that, notwithstanding s. 17 of the Conveyancing and Law of Property Act, 1881, the plaintiff should not be entitled to redeem that mortgage without at the same time redeeming every existing or future mortgage held by the defendants on other property belonging to the plaintiff, or to redeem any other such mortgage without at the same time redeeming that present mortgage.

On April 19, 1899, a receiving order was made against the plaintiff, and on August 26, 1899, he was adjudicated bankrupt.

On May 1, 1900, the defendants, as secured creditors, sent in their affidavit of proof. The defendants in proving lumped together their various debts and various securities respectively, the former amounting to 8206*l.* 14*s.* 2*d.* and the latter being assessed at 3806*l.* 15*s.*, and they claimed to prove for the balance. Their claim was reduced by the trustee to 6497*l.* 18*s.* 2*d.*, as to which no question was now raised.

The shares of the steamships above mentioned in respect of which the defendants claimed a lien for unpaid purchase-moneys were not then, and had never been, transferred by the defendants, but still remained registered in the names of the defendants, the vendors.

On May 10, 1900, the trustee wrote to the defendants' solicitors as follows: "I should be obliged if you will give me the details of the value of the respective securities which you hold under the various documents mentioned in your proof, and also the separate values of each of the steamship shares in respect of which your clients claim a vendor's lien." The information requested was given, but the trustee never objected to the proof being made for the lump sum or required the defendants to distinguish and specify the particular debts and the values of the securities for the same respectively in the proof, and in fact on July 31, 1900, he, without any such separation, admitted the proof to rank for 2691*l.* 3*s.* 2*d.* (being 6497*l* 18*s.* 2*d.* less 3806*l.* 15*s.* the assessed value of the securities), and the separate values of the several securities never were assessed in the proof.

A composition was subsequently duly accepted by the creditors in the bankruptcy and was approved by an order of the Court dated February 1, 1901, upon the terms (inter alia) that the

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creditors should be paid a composition of 9*s.* in the pound, making with a dividend of 3*s.* in the pound already paid a composition of 12*s.* in the pound, and that no further portion of the estate should be realized, and that on payment of the composition the same should be transferred to the plaintiff and the bankruptcy annulled. The composition was duly paid, and by an order dated March 6, 1901, the receiving order was rescinded and the bankruptcy annulled, and it was thereby further ordered "that all the outstanding estate of the said Henry Pearce do revest in him."

Upon payment to the defendants of the composition they retained all their securities and dealt with the same for their own benefit.

On January 28, 1907, the plaintiff issued the writ in this action. In his statement of claim the plaintiff alleged that the defendants had since the composition continued to receive the shares of profits attributable to the steamship shares above mentioned, and had refused to render him accounts and denied his right to redeem any of the securities, and he claimed (1.) a direction that he was entitled to redeem each of the shares on the footing that the defendants were only entitled to hold it as security for the assessed value of the security thereon with interest from the date of composition, (2.) to redeem the several securities, and (3.) an account against the defendants as mortgagees in possession with annual rests.

Wace, for the plaintiff. The plaintiff is entitled to redeem any one of the securities held by the defendants upon payment of its assessed value with interest from the date of assessment: *Couldery* v. *Bartrum* (1); *Société Générale de Paris* v. *Geen* (2); *Knowles* v. *Dibbs*. (3) Each debt ought to have been specified in the proof and the value of the respective securities separately assessed: *In re Smith and Logan* (4); *In re Morris*. (5) Notwithstanding that the proof was for a lump sum, the plaintiff is entitled to redeem any one of the shares in the ships upon

(1) (1881) 19 Ch. D. 394.
(2) (1883) 8 App. Cas. 606.
(3) (1889) 37 W. R. 378.
(4) (1895) 2 Man. 70.
(5) [1898] 2 Ch. 413; [1899] 1 Ch. 485.

payment of its assessed value. There is a right to consolidate under the deed of 1898, but that does not extend to the shares in the ships. A vendor's lien is not a mortgage. It is merely a right to retain the property until payment of the purchase-money: Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 41; Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 57.

Younger, K.C., and *T. L. Wilkinson*, for the defendants. The plaintiff has no longer any right or interest in the property comprised in the securities held by the defendants. As to the shares in the ships the defendants were not, strictly speaking, secured creditors: *Ex parte Clarke* (1); *Ex parte Stapleton*. (2) The proof was for a lump sum against which the defendants held several separate securities. Each security was held against the whole debt. The plaintiff cannot redeem one without redeeming the whole: *In re Morris*. (3) The annulment of a bankruptcy does not put an end to everything that has been done under it: *Gilbey* v. *Jeffries*. (4) The decision in *Société Générale de Paris* v. *Geen* (5) was a decision under the Bankruptcy Act, 1869, and is no authority under the Act of 1883. Under this later Act a new kind of composition was established and quite different rights given to the trustee in bankruptcy and the creditors. *Société Générale de Paris* v. *Geen* (5) decided that where there was no trustee the debtor was in his place, because under those rules the trustee was merely an assignee of the equity of redemption. Under the later Act the trustee has a totally different statutory position. If the debtor after composition and payment allows the trustee to go, then the debtor has no right of redemption, and he cannot come afterwards and ask for an account as from a mortgagee in possession. Without a trustee the provisions of the Second Schedule relating to valuation do not apply and the right of the debtor is gone, and the person who is treated as having valued his security keeps that security. This view is borne out by s. 3, sub-ss. 16 and 17, of the Act of 1890.

We submit that the plaintiff has no right of redemption, but if he has any such right, then it is only a right to redeem the

(1) (1892) 67 L. T. 232, 465.
(2) (1879) 10 Ch. D. 586.
(3) [1898] 2 Ch. 413; [1899] 1 Ch. 485.
(4) (1883) 11 Q. B. D. 559.
(5) 8 App. Cas. 606.

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whole of the securities at the assessed sum. His true right in respect of the shares in the ships is his right under the very contract, namely, a right to obtain specific performance, and not a right in respect of the defendants' lien.

Wace, in reply. The decisions under the Act of 1869 are applicable. The general right is that a compounding debtor is entitled to redeem the securities held by his creditors at the assessed value. That was so decided under the earlier Act and it is still law. Sect. 23, sub-s. 1, of the Act of 1883 provides that in cases of composition after adjudication the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition without adjudication. Sect. 18 of the Act of 1883, which applied to compositions without adjudication, was repealed by s. 3 of the Act of 1890, which substituted similar provisions, and therefore the material consequences are that now in compositions after adjudication the composition is accepted in payment of the debts, and Part III. of the Act of 1883, including the rules in the Second Schedule, apply "so far as the nature of the case and the terms of the composition admit." Where the composition is without adjudication, it is, of course, a necessary consequence that the debtor is bound by the acts of the trustee in the meantime. Upon payment of the composition the outstanding estate revests in the debtor with all the consequences of a composition without adjudication. Rule 353 saves the existing law, procedure, and practice in so far as no other provision is made by the Act or rules.

I submit that the plaintiff is in the position of a compounding debtor entitled to redeem. The defendants either were secured creditors, or, if they were not, it is too late now for them to say they were not. They had sold shares in ships to the plaintiff for a price for which he gave them bills of exchange. There was a contract for the sale of a chattel, and that distinguishes this case from *Ex parte Clarke* (1), which was a case of the sale of a chose in action. The property in the shares passed in equity. They had a right to sue on the bills if they were not met, and they had a lien on the shares. They took up that position, and the composition went through on that footing, and

(1) 67 L. T. 232, 465.

they are now estopped from saying that they were not secured creditors within the meaning of the Bankruptcy Acts: *Roe* v. *Mutual Loan Fund, Ld.* (1)

[The contention that the defendants were not entitled to consolidate their securities was given up by counsel during the course of his reply.]

Cur. adv. vult.

Feb. 15. JOYCE, J. This case raises a question in bankruptcy law said not to have been hitherto decided, as to the respective positions of the debtor and a secured creditor of his in reference to a security valued by the creditor in his proof, and on the deficiency of which—that is, the balance of the debt after deducting the assessed value of the security—a composition has been paid, when, after adjudication under the Act of 1883, a scheme for a composition has been approved, and the bankruptcy has been annulled and the outstanding estate of the debtor revested in him.

Take a simple case. Let us suppose that in a bankruptcy under the Act of 1883 a secured creditor, defined by s. 168 to be a person having a charge or lien upon the property of the debtor as a security for the debt due to him from the debtor, is proving subject to rules 9 to 17 in the Second Schedule to the Act of 1883. Then let us suppose that under the eleventh rule the creditor states in his proof the particulars of his security and the value at which he assesses it, in which case a dividend only in respect of the balance due to him is paid after deducting the value of the security; and where the security is so valued the trustee may at any time redeem it on payment to the creditor of the assessed value. Now let there be, after adjudication, a scheme for composition under s. 23 of the Act of 1883 and the Act of 1890, and a composition paid upon the balance due after deducting the value so assessed of the security; and assume, further, that under s. 23 an order is afterwards made annulling the bankruptcy and vesting the property of the bankrupt in him. In the case that I have supposed, there being no special circumstance or provision in the scheme or any of the orders made in the matter, it is

(1) (1887) 19 Q. B. D. 347.

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contended on the one side that the creditor has become an absolute purchaser of the property comprised in or subject to the security at the assessed value, and that the debtor has no longer any right or interest therein. Now, having regard to what was said in the judgment in the case of *Société Générale de Paris* v. *Geen* (1), I confess that this seems to me a rather startling proposition.

On the other hand it is contended that what was only a security in the creditor before the bankruptcy, which was only a security, though, perhaps, with peculiar incidents, down to the approval of the composition and the order annulling the bankruptcy, still remains but a security afterwards; that the debtor is entitled to redeem upon paying the assessed value with interest unless and until foreclosed by appropriate proceedings, I suppose in the Chancery Division, or unless his rights are barred by the Statute of Limitations. If the case be such a simple one as I have just supposed, then I know of nothing in the Acts or rules, or generally in the bankruptcy law, assuming no notice to have been given under rule 12c of the Second Schedule to the Act of 1883, that would have the effect of converting the secured creditor into an absolute purchaser at the assessed value of whatever was comprised in or subject to his security. Speaking generally and in the absence of any special facts or circumstances, I think that what was merely a security before the composition remains so afterwards, and that the debtor, when his estate is revested in him, becomes entitled to redeem upon payment of the assessed value with interest from the date of the admission of the proof in which the value is assessed and stated.

I will turn now to the facts of the particular case which I have to consider. There was a receiving order on April 19, 1899, and adjudication on August 26. Then on May 1, 1900, the defendants, as secured creditors, sent in their affidavit of proof. The defendants, Messrs. Bullard, King & Co., as creditors, had various debts and various securities, and in proving, according to a very common practice, they lumped their debts and securities respectively and claimed to prove for the balance. Their claim was reduced by a sum of 1500*l.*, as to which there is no question

(1) 8 App. Cas. 606.

now; and by a letter dated May 10, 1900, the trustee, in writing to the creditors, says: "I should be obliged if you will give me the details of the value of the respective securities which you hold under the various documents mentioned in your proof, and also the separate values of each of the steamship shares in respect of which your clients claim a vendor's lien." That was done; that information was given; but the trustee never objected to the proof being made for a lump sum or required the creditor to distinguish and specify the particular debts and the values of the securities for the same respectively in the proof. Indeed he subsequently admitted the proof on July 31, 1900, without any such separation, and he acquiesced, as it appears to me, in the course adopted by the defendants, and the separate values of the several securities never were assessed in the proof.

I should have observed that of the several securities there were two that the creditors were undoubtedly entitled to consolidate; and there were three claims, each of which was in respect of the purchase-money of a share in a steamship which had not and even now has not been transferred by the vendors, the defendants; but all these three shares still remain registered in the names of the creditors, the vendors. In strictness it may well be doubted whether as to these the defendants, Messrs. Bullard, King & Co., were secured creditors, and whether in fact these were secured debts: see *Ex parte Clarke* (1); but they were so treated, that is, treated as secured debts, by the defendants, the creditors, in their proof; and in this it appears to me the trustee acquiesced, although, as between the several purchases, I do not suppose that there was any right in the vendors to consolidate their claims, and at all events no right to consolidate them with the other debts.

Then came a scheme for composition approved by order dated February 1, 1901, upon certain terms, the principal of which were the payment of a composition of 9*s.* in the pound, making with 3*s.* already paid a composition of 12*s.* in the pound, that no further portion of the estate of the debtor be realized, and that on payment of the composition the bankruptcy be annulled. Afterwards, by an order dated March 6, 1901, the bankruptcy

(1) 67 L. T. 232, 465.

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was annulled, and the order provided as follows: "And it is further ordered that all the outstanding estate of the said Henry Pearce do revest in him."

Now, in January, 1907, more than six years afterwards, for some reason or other, perhaps a rise in the value of the steamship shares, or some of them, the plaintiff instituted this action, claiming in effect to redeem each or any of the steamship shares which he purchased, and a great deal of time was taken up in arguing (inter alia) before me as to the right of consolidation. Ultimately the contest upon this point was dropped by the plaintiff's counsel—quite rightly, in my opinion—and in the circumstances any redemption must be, as I think it ought to be, upon the footing that the plaintiff is not entitled to pick and choose between the several securities, but must redeem all or none. At and previous to the composition the estate of the debtor held by the secured creditors, having regard to the proof, formed a security to them for the aggregate assessed value of their securities and was nothing more. As already indicated at the beginning of my judgment, I see no reason for holding that the creditors have more than a security now, and therefore I think that the plaintiff, the debtor, is entitled to redeem all the securities upon payment of interest from the date of the proof. The defendants are not in the position of mortgagees in possession, and, therefore, I do not allow annual rests.

Solicitors: *Loxdales; Robert Greening.*

R. M.

In re WRIGHTSON.
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[1904 W. 3558.]

WARRINGTON J.

1908

March 10, 11, 12.

Administration—Practice—Administration Action—Breach of Trust alleged in Pleadings—Breach made good after Issue of Writ—Common Account and Inquiries—Adding Accounts and Inquiries after Judgment—Breaches of Trust not alleged in Pleadings and proved at Trial—"Wilful Default"—Removal of Trustees, Grounds for.

Where in an administration action a plaintiff by his pleadings charges trustees with a breach of trust, but at the trial is content to take the common form administration judgment, the Court will refuse to allow him at a later stage of the action to charge the trustees with further breaches of trust alleged to have been committed before the issue of the writ or before the judgment, but not alleged in the pleadings and proved at the trial, either for the purpose of obtaining relief against them on account of such breaches of trust, or merely for the purpose of removing them from their office of trustees.

The rule that, if in an action for administration the plaintiff by his pleadings alleges wilful default and proves one instance of it, the Court will direct an account on the footing of wilful default does not apply to the case of a breach of trust.

Job v. *Job*, (1877) 6 Ch. D. 562; *Mayer* v. *Murray*, (1878) 8 Ch. D. 424; *In re Symons*, (1882) 21 Ch. D. 757; *Smith* v. *Armitage*, (1883) 24 Ch. D. 727, distinguished on the above ground.

In an administration action the Court has jurisdiction at any time during the proceedings to remove trustees if it considers such removal necessary for the preservation of the trust estate or the welfare of the cestuis que trust, and that notwithstanding such removal has not been expressly asked for by the pleadings.

ADJOURNED SUMMONS.

Francis Wrightson, by his will dated August 29, 1890, after making divers specific devises and bequests and directing his trustees to retain the yearly sum of 50*l.* as remuneration for carrying out the directions contained in his will, devised and bequeathed all his residuary real and personal estate unto T. H. Bartleet, and Thomas Eborall Cooke, upon trust to sell and convert and to invest the proceeds in the securities thereby authorized, and out of the income of his trust estate to pay

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certain annuities to his wife, Ann Wrightson, and his nine children, naming them, as therein mentioned. And after the death of his wife the testator directed his trustees to divide his trust estate among his nine children in equal shares.

By a codicil to his will, dated August 26, 1891, the testator appointed Samuel Royle Shore to be a trustee of his will in the place of T. H. Bartleet, who had died.

On August 25, 1892, the testator executed a second codicil to his will, which is not material for the purposes of this report.

The testator died on August 6, 1893, leaving his widow and nine children him surviving.

On November 9, 1904, the widow and five of the children commenced the present action against the trustees T. E. Cooke and S. R. Shore, claiming by their writ—(1.) a declaration that a certain investment, hereinafter more particularly referred to, was a breach of trust, and consequential relief; (2.) accounts and inquiries; and (3.) that some fit and proper persons might be appointed trustees in the place of the defendants.

By their statement of claim the plaintiffs, after stating the will and codicils of the testator, his death, proof of his will and codicils, and the state of his family, alleged as follows:—

"6. On or about the 19th day of February, 1897, one Thomas Rowley Bishop a builder of Birmingham was indebted to the firm of Shore & King solicitors carrying on business in the city of Birmingham and of which firm the defendant Samuel Royle Shore was and is senior partner in the sum of 4200*l.* secured with interest thereon at the rate of 4*l.* 10*s.* per cent. per annum by an indenture of mortgage dated the 20th day of April 1896 and an indenture of further charge dated the 19th day of February 1897 whereby certain freehold property situate in Jubilee Road Barmouth in the county of Merioneth was charged by way of mortgage to secure the same.

"7. In or about the months of June July and August 1897 the said firm of Shore & King who then acted as solicitors for the defendants as trustees of the will of the said testator received certain capital moneys belonging to the estate of the said testator and with the knowledge and at the instigation of the defendants applied the same to the amount of 3700*l.* in

repaying to the said firm this much of the said 4200*l.* then due to the said firm on the securities mentioned in paragraph 6 hereof.

"8. No deed of transfer of mortgage was ever executed so as to transfer the said securities to the defendants as trustees of the said will and codicils but by an indenture dated the 10th day of August 1897 and made between the said firm of the first part and the defendants Thomas Eborall Cooke and Samuel Royle Shore of the second part and the defendant Samuel Royle Shore of the third part the said firm declared that they held the said mortgage debt of 4200*l.* and interest at 4½ per cent. per annum as to 3700*l.* and interest at 4 per cent. per annum in trust for the defendants as trustees of the said will and codicils and as to 500*l.* the residue in trust for the defendant Samuel Royle Shore.

"9. No proper valuation was ever made by or on behalf of the defendants in respect of the property upon the security of which the said sum of 3700*l.* was invested and it was at best a contributory mortgage. The plaintiffs submit that such investment was not one authorized by the said will and codicils or proper for the defendants as such trustees to make and was a breach of trust.

"10. The plaintiffs prior to this action never received from the defendants proper statements or accounts shewing accurately how the trust estate had been and was invested and had been dealt with and in the course of attempts which the plaintiffs have from time to time made with a view of obtaining such statements and accounts the defendants made certain proposals.

"11. On or shortly after the 15th September, 1904 the defendants laid before the beneficiaries a very long and detailed statement of their views and put forward at the end thereof two alternative proposals"—which were set forth in full, the short effect of which was either that the plaintiffs must accept the trustees' proposals as to the retention by the trustees of the Barmouth security, or that if they did not do so the trustees would take the security over themselves, and would invest the whole of the trust estate in Consols, thereby diminishing the income arising therefrom.

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The plaintiffs claimed—(1.) a declaration that the investment by the defendants as trustees of the will and codicils of the testator of the said sum of 3700*l.* upon the security mentioned in paragraphs 7 and 8 of the statement of claim was a breach of trust; (2.) that the estate of the testator might be administered and the trusts of his will and codicils carried into execution under the direction of the Court; (3.) that all necessary and proper accounts might be taken and inquiries made and direction given; (4.) that the defendants might be ordered to pay the costs of the action personally; and (5.) further or other relief.

The defendants by their defence admitted paragraphs 6, 7, and 8 of the statement of claim, and did not deny that the advance of 3700*l.* out of the trust moneys on the security of the mortgage referred to in the claim was a technical breach of trust, but alleged that immediately the action was begun the defendant Shore, in completion of arrangements which he had previously made, took up the mortgage personally and had made good to the estate the amount remaining due thereon, and that no loss, but on the contrary a very considerable benefit, had accrued to the estate by the investment.

The action came on for trial before Buckley J. on June 28, 1905, when his Lordship gave judgment as follows:—

"This case having been opened on behalf of the plaintiffs, there was referred to a document which is before me, which is called 'Report of the trustees' solicitors on the present position of the matter for the information of the members of the family, particularly those who are not represented by legal advisers, with ultimate courses of adoption.' The passages which were read so startled me that it seemed to me it was impossible for the defendants to defend the course they had taken. I intimated that to Mr. Buckmaster, who appears for the defendants, and he thereupon submitted to pay the costs of the action. The document, so far as I have seen it, seems to me to be a most improper one. Under those circumstances, the plaintiffs simply ask for a judgment for administration containing the usual accounts and inquiries and staying them all, except with the leave of the judge. I pronounce that judgment. The object of

pronouncing that judgment is this: only certain of the beneficiaries are now parties to the action; that judgment as pronounced will be served on all of them, and they can be brought in in the usual way. If there exists a reason—as to which I say nothing—for removing the defendants as trustees of the will, the other parties having been brought in by this judgment, that can be raised in the action. I therefore pronounce that judgment, and of course any application may be subsequently made by the parties, and steps may be taken to remove the trustees if the facts justify it."

The formal judgment commenced by stating that, "The defendants by their counsel consenting, this Court doth order and adjudge that the defendants Thomas Eborall Cooke and Samuel Royle Shore do pay to the plaintiffs their costs of this action up to and including this judgment to be taxed by the taxing Master." Then, after the usual direction that the trusts of the will should be carried into execution, the judgment proceeded to direct that what are usually referred to as the common accounts and inquiries in an administration action should be taken and made. And it was ordered that "the said accounts and inquiries are not to be proceeded with without the leave of the judge in person"; further consideration was adjourned, and any of the parties were to be at liberty to apply as they might be advised.

On February 27, 1906, the plaintiffs took out the present summons asking that the defendants might be removed from the office of trustees of the will and codicils of the testator, and that two fit and proper persons might be appointed trustees in their place, and that, if and so far as the judge might deem it necessary for this purpose, directions might be given for proceeding with the accounts and inquiries by the judgment in the action directed to be taken and made, or that such additional accounts and inquiries might be directed to be taken and made as the judge should think fit, and that the defendants might be ordered to pay the costs of and incidental to the application and the order to be made thereon.

The widow died on October 29, 1907.

In support of the summons the plaintiffs filed evidence in

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which they alleged that in making certain investments therein specified the trustees had been guilty of further breaches of trust, and gave other instances of alleged misconduct on the part of the trustees.

Cave, K.C., and *T. Lea Higgins*, for the plaintiffs. We ask that the additional accounts and inquiries may be directed with a view of ascertaining whether the trustees have been guilty, as we allege, of further breaches of trust in their dealings with the trust estate. It is not necessary that these breaches of trust should be alleged in the pleadings and proved at the trial. It is sufficient if one instance of breach of trust is alleged and proved at the trial: *Job* v. *Job* (1); *Mayer* v. *Murray* (2); *In re Symons* (3); *Smith* v. *Armitage*. (4)

[WARRINGTON J. Those were all cases of wilful default, and not of active breach of trust.]

The judges in their judgments in those cases used the words "wilful default" and "breach of trust" as interchangeable. Wilful default is used as covering breaches of trust and misconduct. It is submitted that the principle of the cases cited applies equally to the case of breach of trust.

[WARRINGTON J. referred to *Laming* v. *Gee*. (5)]

Apart from the further accounts and inquiries, we ask to be allowed to proceed with the accounts and inquiries directed by the order of June 28, 1905, as we believe we can charge the trustees with considerable sums. We also ask for the removal of the trustees.

Rowden, K.C., and *John Henderson*, for the trustees. There is no precedent for ordering further accounts and inquiries with reference to breaches of trust not alleged and proved at the trial. The cases cited were all cases of wilful default, and wilful default was pleaded. They have, however, no application to the case of breach of trust.

[They were stopped on this point.]

Then, as to removing the trustees; it is admitted that the

(1) 6 Ch. D. 562.
(2) 8 Ch. D. 424.
(3) 21 Ch. D. 757.
(4) 24 Ch. D. 727.
(5) (1878) 10 Ch. D. 715.

Court has ample jurisdiction to remove trustees where it is satisfied that such removal is necessary for the protection of the trust estate or for the welfare of the cestuis que trust. Here, however, nothing remains for the trustees to do but to wind up and distribute the trust estate. Having regard to this and to the fact that the present application is opposed by a considerable number of the cestuis que trust, the case is one, it is submitted, in which the Court ought to refuse the application.

H. Terrell, K.C., and *H. E. Wright*, for beneficiaries who had been served with the order of June 28, 1905. We ask the Court to dismiss the whole of the summons and to direct that the estate shall not be called upon to bear any of the costs of it. The plaintiffs have no reasonable grounds for applying to remove the trustees. They do not rely on the facts proved at the trial, but seek to adduce further evidence. By their writ they claimed the removal of the trustees, but abandoned that claim in their statement of claim.

Cave, K.C., in reply. On the facts as pleaded it is submitted that a strong case is made out for the removal of the trustees. The practice is that where trustees have been found to have acted improperly the Court may remove them at the instance of some only of the beneficiaries.

WARRINGTON J. The application with which I have to deal is an application by the plaintiffs, who are some only of the persons entitled to the estate of the testator Francis Wrightson, that the present trustees may be removed from the office of trustees of the will and codicils of the testator, and that two fit and proper persons may be appointed trustees in their place, and that, if and so far as the judge may deem it necessary for this purpose, directions may be given for proceeding with the accounts and inquiries by the judgment in the action directed to be taken and made, or that such additional accounts and inquiries may be directed to be taken and made as the judge shall think fit, and that the defendants may be ordered to pay the costs of the summons.

This application raises a very important question, namely, whether it is competent to the plaintiffs in this action, having

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regard to the pleadings and to the judgment which has been obtained (to which I shall refer presently more at length), to charge the trustees with a breach of trust not alleged in the pleadings, and as to which no evidence was, of course, adduced at the trial. There is a further question, but one of comparatively little importance, namely, whether upon the facts alleged in the pleadings and proved at the trial the present case is one in which the Court ought to exercise the jurisdiction which it undoubtedly has to remove trustees, if it thinks it necessary for the welfare of the trust. With regard to the first and really important question, it is necessary to see what is the nature of the pleadings and what was the judgment pronounced at the trial.

The statement of claim, after stating the will by which the testator's estate, subject to the payment of certain annuities during the life of his widow, was on the widow's death divisible amongst his nine children in equal shares, and stating the position of the family, proceeds to allege in paragraphs 6, 7, and 8 a breach of trust by the trustees. I need not state what that breach of trust was, but it alleges a breach of trust by the trustees in connection with the advance of a certain part of the trust funds upon mortgage. Paragraph 10 alleges that prior to the action the plaintiffs never received from the defendants proper statements of accounts. Then paragraph 11 alleges that "On or shortly after the 15th of September, 1904 the defendants laid before the beneficiaries a very long and detailed statement of their views and put forward at the end thereof" certain proposals which are set forth in full in the statement of claim. I shall have to return to that presently, and therefore I need not say more about that at present. Then by the claiming part of the statement of claim the plaintiffs claimed a declaration that the investment to which I have referred was a breach of trust; that the estate of the testator might be administered and the trusts of his will and codicils carried into execution under the direction of the Court; that all necessary and proper accounts might be taken and inquiries made and directions given; and that the defendants might be ordered to pay the costs. There are two things to be noted on that statement of claim—first, that the whole case of

the plaintiffs, by which they sought to charge the defendants with the costs of the action, i.e., which constituted the hostile nature of the action against the trustees, is really contained in paragraphs 6, 7, and 8. There is no charge of wilful default or of refusal to furnish accounts. The defendants by their defence admitted the facts relating to the breach of trust, and stated that they had made it good—that is to say, that one of them had himself taken over the security which was questioned. By the judgment made at the trial, which was a consent judgment, the defendants were ordered to pay the costs. It is expressed in this way: "The defendants by their counsel consenting, this Court doth order and adjudge that the defendants Thomas Eborall Cooke and Samuel Royle Shore do pay to the plaintiffs their costs of this action up to and including this judgment to be taxed by the taxing Master." Then there is the usual direction that the trusts of the will are to be carried into execution under the direction of the Court. Then the judgment proceeds to direct what are usually referred to as the common accounts in an administration action, accounts of the personal estate and an account of the proceeds of sale of the real estate, but in each case the common accounts. The judgment then directs that the accounts and inquiries are not to be proceeded with without the leave of the judge in person, adjourns further consideration, and gives liberty to the parties to apply as they may be advised—that is to say, it is in every respect a common form of administration judgment. At the hearing a question arose with regard to an order for the removal of the trustees; the writ had asked for that order, the statement of claim did not ask for it, but the learned judge who heard the action in the course of his judgment stated that when the judgment had been served upon the other persons beneficially interested the plaintiffs might be at liberty to apply for the removal of the trustees, if the facts should justify that removal. That, therefore, was the judgment.

Now, I desire to say this first with regard to the practice as to the removal of trustees. It seems to me that it is probably unnecessary to ask expressly for the removal of the trustees. If the facts alleged in the pleadings, or if the facts ascertained

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in working out the judgment pronounced at the trial or the inquiries properly added to it according to the practice of the Court, shew that the removal of the trustees is necessary for the welfare of the trust, I have no doubt that, as the Court is carrying the trusts into execution under its direction, it would have jurisdiction to do that which is one of the incidents to the execution of the trusts, namely, do that which is necessary for the preservation of the trust property or the welfare of the cestuis que trust. Further, I think also that if the trustees subsequently to judgment were to be guilty of some misconduct, or if some circumstances should arise subsequently to judgment which made it necessary to remove the trustees, the Court then would have jurisdiction to do so. But the question here is whether it is open to the plaintiffs in this action, having regard to the judgment that was pronounced, to charge the trustees with a breach of trust alleged to have been committed before the issue of the writ, or before the judgment, either for the purpose of obtaining relief against them as having committed breaches of trust, or for the purpose of removing the trustees. I am quite clear on this—that unless the plaintiffs are at liberty to charge the trustees with a breach of trust for the purpose of obtaining relief, they would not be entitled to charge them with that breach of trust merely for the purpose of removing them from being trustees. I think that it would be an absurd conclusion to suppose that a breach of trust might be proved against the trustees, no relief obtained on that footing, and yet that an order could be made for their removal on that ground.

It seems to me, therefore, that the question really is that which I have stated at the beginning of my judgment, namely, Is it competent to the plaintiffs in an action of this kind, and with this judgment, to charge the trustees with a breach of trust that is not alleged in the pleadings and proved at the trial? No authority has been referred to in the affirmative of such a proposition. I will explain what I mean by that directly, because certain authorities were referred to which were said to be affirmative of that proposition, but in my opinion they are not. Take these present pleadings for example and consider the position of the parties at the time the action came on for trial.

Assuming the plaintiffs to have known of another breach of trust which was not alleged, would it have been competent for them on this statement of claim to have obtained a judgment for relief founded on that breach of trust? Plainly not. The rules require that in cases of breach of trust particulars shall be alleged in the pleadings, and without amendment it would have been hopeless for the plaintiffs to have sought to charge the trustees with a breach of trust other than that alleged in the pleadings.

Is it the practice of the Court where one breach is proved to direct some roving inquiry with a view of ascertaining whether there are any other breaches of trust? I think plainly not. No instance of the sort has been cited, and if it were the practice the rules requiring particulars to be given would be ridiculous and absurd. It seems to me that, in regard to a breach of trust, that is to say, an active breach of trust, in its active and proper sense, the plaintiffs are not entitled to relief at the trial, except in regard to that which is alleged in the pleadings and proved at the trial.

It is said that, if I take this view, I am acting counter to a well-known class of authorities with regard to wilful default. I do not think so at all; and I will explain why. It is well known, of course, that in a case of wilful default, which is quite distinct from active breach of trust, if wilful default is pleaded and if a case is established, then the accounts are directed on that footing. But why is that? It is because there are two perfectly distinct classes of accounts which are directed in cases of this kind—one is the common account, and the other is the account on the footing of wilful default; and if it is shewn that a trustee has been guilty of wilful default, then the second of those forms of account is adopted, and not the first. That is all. If I may put it shortly, what I mean is that there is a kind of character attaching to a trustee which is referred to by the expression "wilful default"; and, if it is proved that he is a trustee coming under that character, then that particular form of account is directed, and not the other. But in the case of a breach of trust there is no general form of account which is substituted for the common account. In cases of breach of trust relief is

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given in respect of those specific breaches of trust which are proved, and in respect of those only; and it seems to me that is the true distinction between the line of authorities which have been cited with regard to wilful default and those which apply to the present case. As to the former class of cases, there is no question that the rule is that, if wilful default is alleged and if an instance is proved, then the trustees are not in a position to claim to have against them the ordinary account only, but the account must be directed on the footing of wilful default. In my judgment that rule does not apply to cases of breach of trust.

The old practice of the Court of Chancery was quite clear with regard to breaches of trust. If a plaintiff brought a suit and took a decree in the ordinary form, not only could that decree not be added to by a charge of breach of trust, but a fresh action charging the trustees with breach of trust could not be brought except by the leave of the Court.

In my opinion, therefore, it was not competent to the plaintiffs in this present action to charge the trustees with breaches of trust not alleged in the pleadings and proved at the trial; and, of course, if that is so, then it would be wrong for me to direct further inquiries, such as are suggested by the plaintiffs, in reference to certain investments referred to in the affidavits, with a view of ascertaining whether, in making those investments, the trustees were or were not guilty of a breach of trust. That deals with the last part of the plaintiffs' application.

Then, am I to direct that, for the purpose of the application for the removal of the trustees, the common accounts shall be proceeded with? It seems to me that it would be useless. I have had nothing shewn to me which would indicate that, if the common accounts were proceeded with, the result of those accounts, namely, the certificate to be made on those accounts, would establish such a state of things as would justify the removal of the trustees. It seems to me, therefore, that for the removal of the trustees it is not necessary to remove the restrictions placed by the judgment on proceeding with the common accounts.

The next question is, Ought I to make an order for the removal of the trustees upon the materials which were before

the Court at the trial, which, in my judgment, are the only materials at which I can look? That raises a somewhat troublesome question. The trustees admitted that they were guilty of a breach of trust. The statement to which I have already referred, together with the proposals of the trustees, was remarked upon in strong language by the judge at the trial, and I desire to associate myself with the remarks which he made without further explanation that that statement is one which the trustees ought not to have made, and I think that the learned judge intended that an application for the removal of the trustees founded on that statement should prima facie be one which would at all events receive the favourable attention of the Court. But I have now before me not only the plaintiffs, but other beneficiaries representing somewhere about one-half of the estate. The plaintiffs' interest, if you are to count heads, predominates to some extent, but I have a very substantial proportion of the beneficiaries who object to the removal of the trustees, and who say there is no ground for it. Now, what are the grounds on which the Court removes trustees? The only case that I can find which helps one at all in this matter is the case of *Letterstedt* v. *Broers* (1), in the Privy Council. There some very valuable remarks were made by Lord Blackburn, who delivered the judgment of the Judicial Committee. (2) He says: "The whole case has been argued here, and, as far as their Lordships can perceive, in the Court below, as depending on the principles which should guide an English Court of Equity when called upon to remove old trustees and substitute new ones. It is not disputed that there is a jurisdiction 'in cases requiring such a remedy,' as is said in Story's Equity Jurisprudence, s. 1287, but there is very little to be found to guide us in saying what are the cases requiring such a remedy; so little that their Lordships are compelled to have recourse to general principles." Lord Blackburn then cites the following statement from Story (s. 1289): "But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of

(1) (1884) 9 App. Cas. 371. (2) 9 App. Cas. 385.

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trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity." Lord Blackburn then continues: "It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases." And then he thus sums up what he regards as expressing the general principle guiding the Court in these cases (1): "In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case." Is it necessary here, having regard to the welfare of the beneficiaries and for the protection of this trust, to remove the trustees? At the present moment nothing remains for the trustees to do except to wind up the estate; the testator's widow is dead; the whole of the estate is divisible amongst a number of persons who are sui juris. But the summons was taken out on February 27, 1906, two years ago, at a time when the widow was alive and the estate was not immediately divisible, and therefore I must, with a view at any rate of dealing with the costs, look at the state of things as they existed at the date when the summons was issued. Is it necessary for the welfare of the trust now to remove the trustees on the grounds alleged in the statement of claim? There is one contention on the part of the plaintiffs to which I think I ought to refer. Mr. Cave as one argument, or as one reason for the removal of the trustees, said, in effect, "We do not like to have these persons who have been charged with a breach of trust and have admitted it, and who have made that statement which is set

(1) 9 App. Cas. 387.

out in the pleadings, in custody of our trust estate." That is not enough, especially when there are other cestuis que trust entitled. A somewhat similar question arose in the case of *Forster* v. *Davies* (1), in which Turner L.J. expressed the view, which I have just expressed, that disagreement between the cestuis que trust and the trustees, or the disinclination on the part of the cestuis que trust to have the trust property remain in the hands of a particular individual, is not a sufficient ground for the removal of the trustees. You must find something which induces the Court to think either that the trust property will not be safe, or that the trust will not be properly executed in the interests of the beneficiaries. Is that so here, and is it for the welfare of the trust generally, and not merely of the plaintiffs, that these trustees should be removed? I think it is not. The trustees were undoubtedly guilty of a breach of trust, and they undoubtedly in the statement to which I have referred expressed views which have occasioned the blame which has been attached to the trustees both by Buckley J. and myself, but, having regard to the fact that the Court has now the power of seeing that the trust is properly executed, to the fact that a large proportion of the beneficiaries do not require the trustees to be removed, and further (and this is of great importance), to the extra expense and loss to the trust estate which must be occasioned by the change of trustees, I think it would not be for the welfare of the cestuis que trust generally, or necessary for the protection of the trust estate, that these trustees should be removed. I must therefore refuse the application for their removal as well as the application for the further accounts and inquiries.

Solicitors: *Stibbard, Gibson & Co., for Rowlands & Co., Birmingham; Crowders, Vizard, Oldham & Co., for Hooper & Ryland, Birmingham; Field, Roscoe & Co., for Pinsent & Co., Birmingham.*

(1) (1861) 4 D. F. & J. 133, 139.

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March 12, 13.

In re GEDNEY.

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[1906 G. 1403.]

Administration Action — Insolvent Estate—Unsecured Debts—Mortgages by Testator—Assignment of Debts and Transfers of Mortgages after Death to same Person—Surplus Proceeds of Sale of mortgaged Property—"Mutual Dealings"—Set-off—Judicature Act, 1875 (38 *&* 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 38.

A testator by his will, dated in 1890, devised and bequeathed all his real and personal estate to his widow and appointed her his sole executrix. He died in 1891 insolvent. The widow did not prove the will. In 1907 a judgment was given for the administration of his real and personal estate. Between the date of testator's death and the date of the judgment H. purchased and had assigned to him certain bond and simple contract debts due from the testator and also took transfers of certain mortgages upon the testator's real estate. In exercise of the powers of sale contained in the mortgages H. sold the mortgaged properties, and after paying himself principal and interest out of the proceeds there remained in his hands a balance which he claimed to set off in satisfaction pro tanto of the debts due to him from the testator's estate:—

Held, that the purchase by H. after the testator's death of the debts and the transfers to him of the mortgages followed by a sale under the powers of sale were not "mutual dealings" between him and the testator's estate within s. 38 of the Bankruptcy Act, 1883, and that he was not therefore entitled to the right of set-off he claimed.

Point of law referred by the Master under Order lv., r. 69, to the Court for decision.

William Gedney, by his will dated August 25, 1890, devised and bequeathed all his real and personal estate to his wife, Betsey N. Gedney, and appointed her his sole executrix.

The testator died on May 30, 1891, but, his estate having been found to be insolvent, Mrs. Gedney did not prove the will.

At the date of his death the testator was indebted to certain persons in a sum of 1005*l.*, representing trust moneys in his hands, for which he had given them three bonds. He also owed his solicitors 1160*l.* 6*s.* 7*d.* for advances, disbursements, and costs.

He died possessed of considerable real estate, which was subject to numerous mortgages.

Mrs. Gedney died on June 27, 1893, having by her will, dated May 13, 1892, devised and bequeathed all her real and personal estate, including the real estate devised to her by the testator, to trustees upon trust to sell and after payment of the testator's debts to divide the net profits equally amongst her nephews and nieces.

In 1901 one L. C. Harvey purchased the bond debts of 1005*l.*, and in 1903 he purchased the simple contract debt of 1160*l.* 6*s.* 7*d.* due to the solicitors, and these debts were duly assigned to him. Between the years 1901 and 1904 Harvey took transfers to himself of seven of the mortgages on the testator's real estate, and in the years 1902 to 1905, in exercise of the powers of sale contained in the mortgages, he sold the various properties therein comprised, and after paying himself the principal and interest due thereunder there remained in his hands a surplus of 1586*l.* 15*s.*

On July 10, 1906, letters of administration, with the will annexed to the testator's estate, were granted to J. Grummitt.

On July 13, 1906, an originating summons was taken out for the administration of the testator's real and personal estate; and on March 11, 1907, the usual creditors' judgment for administration was given.

On June 24, 1907, an order was by consent made adding Harvey as a defendant to the action and directing that the following further inquiries should be made:—

"9. An inquiry whether any and what part of the testator's estate is outstanding in the hands of the said L. C. Harvey, and whether he is a debtor to the estate for any and what amount.

"10. An inquiry whether the said L. C. Harvey is a creditor of the testator's estate for any and what amount.

"11. An inquiry whether the said L. C. Harvey has any and if so what right to set off or retain the whole or any part of the moneys in his hand arising out of or derived from the testator's estate in respect of any and what claims by him against the said estate."

On proceeding with the accounts and inquiries in chambers a question arose on inquiry 11 whether Harvey was entitled, as he

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claimed to be, to set off the 1586*l.* 15*s.* in his hands representing the surplus proceeds of sale of the mortgaged property in satisfaction pro tanto of the debts of 1005*l.* and 1160*l.* 6*s.* 7*d.* due to him from the testator's estate. The Master, under Order LV., r. 69, adjourned the matter to the judge for decision. The question now came on for argument.

Rowden, K.C., and *J. M. Stone*, for the plaintiffs. The testator's estate being insolvent, it is admitted that the bankruptcy rules as to mutual credits and set-off are by s. 10 of the Judicature Act, 1875 (1), made applicable to its administration. The question is whether Harvey is entitled under s. 38 of the Bankruptcy Act, 1883 (the mutual credits clause) (2), to set off the surplus proceeds of sale of the mortgaged property against the debts due to him from the testator's estate, and it is submitted that he is not. There never were any mutual dealings between the testator and Harvey. Harvey was never either a debtor or creditor of the testator. Where a mortgagor dies insolvent, and the mortgagee realizes his security and, after paying himself the mortgage debt out of the proceeds, has a surplus in his hands, he cannot retain that surplus in payment of a simple contract debt due to him from the mortgagor and so give himself a preference over the other creditors: *Talbot* v. *Frere* (3); *In re Gregson.* (4)

(1) The Judicature Act, 1875, s. 10, provides: "In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities . . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt . . . ."

(2) The Bankruptcy Act, 1883, s. 38, provides: "Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively . . . ."

(3) (1878) 9 Ch. D. 568.

(4) (1887) 36 Ch. D. 223.

The characteristic of mutuality is still as necessary under the mutual credit clause of the Bankruptcy Act, 1883, as under the mutual credit clauses of the prior Bankruptcy Acts in order that a set-off may be claimed: *In re Mid-Kent Fruit Factory.* (1)

It is admitted that the point of time for ascertaining the existence of mutual dealings is by virtue of s. 10 of the Judicature Act, 1875, the date of the administration judgment: *In re Summers.* (2) But even so there was no mutuality: *In re Milan Tramways Co.* (3) That that was so is shewn by the fact that the debts were due from the testator's estate, but the surplus proceeds of sale of the mortgaged property passed to the testator's devisee and those taking under her and were not assets for payment of debts at all till the administration judgment made them assets under the provisions of the Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104). Therefore until the administration judgment there was no reciprocal relationship between the debts and the surplus proceeds, and that judgment could not create mutuality where none previously existed.

Dighton Pollock, for the defendant Harvey. The right of set-off which Harvey is seeking to enforce is a statutory right given him by s. 38 of the Bankruptcy Act, 1883, and is quite distinct from the ordinary right of set-off under the statutes of set-off: *Forster* v. *Wilson.* (4) In bankruptcy the date to be taken for ascertaining the existence of mutual credits for the purposes of set-off under s. 38 of the Bankruptcy Act, 1883, is the date of the receiving order: *In re Daintrey.* (5) In applying the bankruptcy rule as to set-off in s. 38 to the case of the administration of an insolvent estate the judgment for administration is by virtue of s. 10 of the Judicature Act, 1875, made equivalent to an adjudication in bankruptcy: *In re Summers.* (2) The rule acts automatically and fixes the date for ascertaining the mutual credits at the making of the judgment for administration: *Watkins* v. *Lindsay & Co.* (6) The words "mutual dealings" in s. 38 do not imply that the dealings must necessarily be personal. An

(1) [1896] 1 Ch. 567, 570.
(2) (1879) 13 Ch. D. 136.
(3) (1884) 25 Ch. D. 587, 590, 591.
(4) (1843) 12 M. & W. 191, 203.
(5) [1900] 1 Q. B. 546.
(6) (1898) 5 Man. 25; 67 L. J. (Q.B.) 362.

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assignee of a creditor before the line is drawn stands for the purposes of a set-off in the same position as the creditor: *Hawkins* v. *Whitten*. (1)

At the date of the judgment for administration, therefore, there were mutual credits, mutual debts, or other mutual dealings between Harvey and the testator's estate within the meaning of s. 38 of the Bankruptcy Act, 1883. The estate was undoubtedly indebted to Harvey in respect of the debts assigned to him in 1901 and 1903. Interest on these debts ran up to the date of the judgment for administration: *In re Summers* (2); and the testator's estate therefore became liable for something for which the testator was not liable at his death. Further, he was also indebted to the testator's estate in respect of the surplus proceeds of sale in his hands. It is true that he held them as trustee for the testator's devisee, but they were nevertheless a debt due from him to the estate: *Sharp* v. *Jackson*. (3) The debt is no doubt an equitable and not a legal one.

[WARRINGTON J. There was no debt until the sales took place.]

At the date of the judgment for administration Harvey owed money to the estate which he is entitled to set off against the debts owing to him from the estate. If the testator were alive there would be no question that Harvey would be entitled to a set-off. *Talbot* v. *Frere* (4) is distinguishable. It was a decision under the old statutes of set-off. *In re Gregson* (5) merely followed *Talbot* v. *Frere* (4), and the point as to whether there was a set-off under the Bankruptcy Act, 1883, was not there raised.

[WARRINGTON J. The point in *In re Gregson* (5) was that the money there was due to the executor and not to the testator.]

In re Mid-Kent Fruit Factory (6) was a case of bailment and is therefore distinguishable. It is also inconsistent with *Palmer* v. *Day & Sons*. (7)

(1) (1829) 10 B. & C. 217.
(2) 13 Ch. D. 136.
(3) [1899] A. C. 419, 426.
(4) 9 Ch. D. 568.
(5) 36 Ch. D. 223.
(6) [1896] 1 Ch. 567.
(7) [1895] 2 Q. B. 618.

[He also referred to Wace on Bankruptcy, pp. 126, 127, citing *French* v. *Fenn* (1) and *Astley* v. *Gurney*. (2)]

H. Johnston, for the defendant Grummitt, took no part in the argument.

WARRINGTON J. stated the facts, observing that he was not quite sure that the action was properly constituted for the purpose of the judgment as to the real estate—in fact he rather thought it was not—but that for the purposes of the present application he must treat the judgment as having been properly obtained both as regards the real and as regards the personal estate. He continued:—The case is rested entirely on s. 38 of the Bankruptcy Act, 1883. Before referring, however, to that section it is necessary to see how it is that it becomes material in an administration action to consider that section. That depends upon s. 10 of the Judicature Act, 1875. [His Lordship read the material part of the section and continued:—] It has been held that the bankruptcy rules with regard to set-off are within the provisions of that section, and it is admitted for the purposes of the present application that a judgment for administration is for the purpose of applying the rules in bankruptcy equivalent to an adjudication in bankruptcy. I now turn to s. 38 of the Bankruptcy Act, 1883. [His Lordship read the section, and continued:—] Now does that section allow a set-off to be made in the circumstances of the present case? It is necessary to look again at the actual position. The debts owing to Harvey are debts due from the testator. The money in Harvey's hands is money which never belonged to the testator and was never a debt due to the testator from him. It is money which represents the value of the testator's equity of redemption in certain mortgaged real estate, that is, what remains after payment of the money due upon the mortgage, and the right to receive that money when the power of sale was exercised by Harvey was vested neither in the testator nor even in his creditors, but in the devisee of his estate. It is only by virtue of the Administration of Estates Act, 1833, that creditors

(1) (1783) Cooke's Bankrupt Laws, 8th ed. p. 565.
(2) (1869) L. R. 4 C. P. 714.

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of the testator can get that money at all. The money is not a debt due to them. The equity of redemption in the property sold was an asset to be administered in a Court of Equity in a suit by them against the devisee of the testator. No creditor, nor even all the creditors together, could have maintained an action against Harvey to make him pay this money to them. All that they could do would be to obtain an order in a suit by them against the devisee for administration, and then the devisee might, of course in a proper case, be compelled to bring the necessary action against the mortgagee in the nature of a redemption action, or such an action might have been brought by the creditors themselves in the name of the devisee. But the point is that the money in Harvey's hands does not constitute a debt due to the creditors. Apart from the provisions of the Bankruptcy Act, 1883, it is quite clear that Harvey can have no right of set-off. That is so decided by *Talbot* v. *Frere* (1) and by *In re Gregson*. (2) The debts due to Harvey being debts due from the testator, and there being the other money which was held by Harvey in trust for the devisee of the testator, there could, prior to the Judicature Act, 1875, be no set-off of the one against the other. The question must therefore depend entirely upon the Bankruptcy Act, 1883, and, under that Act, in order that the right of set-off may be applied it is necessary to find that there have been "mutual credits, mutual debts, or other mutual dealings between the debtor against whom" the order is made—that is, here, the testator—"and any other person proving or claiming to prove a debt" against his estate. Therefore it is necessary to find a mutual dealing which will give rise to a right of set-off. In the present case there are, as it seems to me, no mutual credits, mutual debts, or other mutual dealings between Harvey and the testator, and for the reason which I have mentioned, namely, that one dealing gives rise to a debt due from the testator to Harvey, and the other gives rise to a debt due from Harvey, not to the testator, but to the testator's devisee. The only answer which has been attempted to be given to that is that it is said that for the purpose of administration the word "debtor" in s. 38 must be read

(1) 9 Ch. D. 568. (2) 36 Ch. D. 223.

as if it were "estate," that is, the estate with all rights and liabilities which exist between the creditors and the property of the testator—all the rights and liabilities which result from the death of the testator. But, even so, still I do not think that there would be any mutual credits, mutual debts, or other mutual dealings within the meaning of the section. It may be true that eventually the money in the hands of Harvey will be divided among the creditors of the testator, but that is not enough to make mutual debts, mutual credits, or mutual dealings within the Act. I come, therefore, to the conclusion that in this case the Bankruptcy Act, 1883, has made no difference in the law from what it was before the Judicature Act, 1875.

I may point out that *In re Gregson* (1), before North J., is a case which is much like the present. It was after the Judicature Act, 1875, but s. 10 of that Act was not referred to, and the matter was treated both by the judge and the parties as if it ought to be dealt with under the old law of set-off. And I think it is possible that all parties may have omitted to refer to the Judicature Act, 1875, because they were satisfied that the old law would apply. But I do not rest my decision upon that case, but upon the fact that in my opinion s. 38 of the Bankruptcy Act, 1883, does not apply to the present case.

Solicitors: *Desborough, Son & Prichard, for H. H. Harvey, Spalding; Hobson & MacMahon, for Calthrop & Leopold Harvey, Spalding.*

(1) 36 Ch. D. 223.

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[1860 T. 136.]

Settled Land—Powers exercisable by Trustees—Conflict of Powers—Consent of Tenant for Life—Compound Settlement—Private Act of Parliament conferring Powers but not creating Limitations—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 1; *s.* 56, *sub-ss.* 1, 2.

Where land is by will vested in trustees in trust for persons by way of succession, a private Act of Parliament which merely confers upon the trustees powers of developing and managing the land as a building estate, but does not incorporate the will, nor itself create any limitations to or in trust for any persons by way of succession, is not part of "the settlement" within the meaning of s. 56, sub-s. 2, of the Settled Land Act, 1882; and no consent by the tenant for life to the exercise of those powers by the trustees is rendered necessary by that sub-section.

Adjourned Summons.

By the will and codicil of Charles Scarisbrick, who died in 1860, his Lancashire estates were vested in trustees upon trust as to one equal undivided third share for his son William Scarisbrick and his family, as to another one-third share for the testator's son Charles (now Sir Charles) Scarisbrick and his family, and as to the remaining one-third for the testator's daughter Mary Ann Scarisbrick (who became Lady Naylor Leyland) and her family.

William Scarisbrick and his eldest son, C. F. M. Scarisbrick, executed in 1882 a disentailing deed and resettlement of their share. William Scarisbrick died in January, 1904, and C. F. M. Scarisbrick became tenant for life in possession. He died in February, 1908, and the share was now vested in an infant tenant in tail.

Sir Charles Scarisbrick was still alive and tenant for life under the will and codicil. In 1895 he and his eldest son, Tom T. L. Scarisbrick, executed a disentailing deed and resettlement under which Sir Charles was tenant for life of their share in restoration and continuance of his former life estate under the will and codicil, with remainder to Tom T. L. Scarisbrick for life, with

remainder to his sons successively in tail male. By deeds of July 16, 1907, and August 26, 1907, Sir Charles surrendered to Tom T. L. Scarisbrick his life interest in part of their share; so that there was now no subsisting life estate under the will and codicil in that part of their share.

Mary Ann Scarisbrick married Colonel Naylor Leyland, and when her eldest son attained twenty-one in 1885 their share was resettled. She died in 1902, and, her eldest son having predeceased her, her grandson Sir A. E. H. Naylor Leyland, an infant, was now tenant in tail in possession of their share under the resettlement.

The testator's Lancashire estates comprised large and valuable building property in and near Southport which he was developing as a building estate. His will gave the trustees no power for that purpose, and the codicil only contained general directions that they should continue and encourage sales or leases of building land. In 1860 the trustees filed a bill for the administration of the estate. On November 10, 1860, a decree was made whereby, inter alia, it was declared that the trustees were empowered by the will to lease and sell building land as the testator had done. It was found impracticable to develop the estate under these powers, and in 1877 a private Act of Parliament, called the Scarisbrick Estate Act, 1877 (40 & 41 Vict. c. vi.), was obtained, which recited the will and codicil and the history of the estate, that the powers of the trustees were too restricted for the development of the estate, and that it would be greatly for the benefit of the beneficiaries that larger powers should be given to the trustees. It then proceeded to confer upon the trustees very extensive powers of making leases and improvements of the property. By s. 16 certain powers of granting leases were not to be exercised without the consent of any equitable tenant for life under the will and codicil who gave notice to the trustees not to act without his consent; it was admitted that the consent of Sir Charles Scarisbrick was required under this section, and he and Tom T. L. Scarisbrick had given notices. By s. 37 power was given to the Chancery Division to make partition of the property into separate thirds; but the Act in no way interfered with the limitations of the will

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and codicil, nor did it itself create any limitations. The Act did not incorporate the will and codicil, nor did it expressly limit the period during which the powers given to them by the Act were to be exercisable by the trustees.

In 1904 a private Act of Parliament was passed, called an Act to amend the Scarisbrick Estate Act, 1877, which was to be read and construed together with the principal Act as forming one Act. This Act validated certain things which the trustees had done and gave them some further powers, but contained no limitations of the estates.

The property turned out to be very valuable, and its development and management had given rise to a great deal of litigation. The present application was by the trustees of the will and codicil for the determination of the question whether the powers conferred upon the trustees by the private Act of Parliament of 1877 still continued to be exercisable by the trustees, and, if so, whether they affected the whole of the property and were exercisable without the consents of the tenants for life; and, further, whether Tom T. L. Scarisbrick was entitled to call for an immediate conveyance of the legal estate in an undivided third of the settled estate.

J. T. Prior, for the trustees of the will, stated the facts.

Rowden, K.C., and *Austen-Cartmell*, for Sir Charles Scarisbrick and Tom T. L. Scarisbrick. The powers conferred on the trustees by the settlement, if exercisable at all, can only be exercised with the consent of Sir Charles and Tom T. L. Scarisbrick. The powers conferred by the Act of 1877 have come to an end at all events in respect of our one-third undivided share. But if in fact they still exist, they are in many instances in conflict with the powers given to the tenant for life by the Settled Land Act, 1882. By s. 56, sub-s. 1, of that Act the powers conferred by the Act of 1877 are preserved; and by sub-s. 2 the powers of the Settled Land Act are to prevail, and the consent of the tenant for life is "necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act." This is a compound settlement of which the private Act of 1877

forms part; so the consents of the tenants for life, Sir Charles and Tom T. L. Scarisbrick, are necessary to any exercise by the trustees of their powers under that Act: *In re Duke of Newcastle's Estates* (1); *In re Chaytor's Settled Estate Act.* (2) The powers given to the tenant for life by the Settled Land Act cannot be prohibited or limited by any settlement or other instrument: s. 51. By s. 2, sub-s. 10 (i), of the Settled Land Act, land includes an undivided share in land; and by s. 2, sub-s. 1, any Act of Parliament or other instrument under or by virtue of which "any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for the purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires." From this definition it is clear that the private Act of 1877 forms part of this settlement. If the Court should be of opinion that the Act of 1877, although ancillary to the settlement, does not form part of it, and that s. 56, sub-s. 2, of the Settled Land Act does not apply to the powers conferred by the Act of 1877, we submit that those powers can no longer be exercised by the trustees, at all events in respect of our share, inasmuch as it has come home, and we are entitled to call for a conveyance. That is clear from the construction of the Act of 1877 itself, and these questions depend upon the intention of the settlor. The Act of 1904 was passed in order to confirm some doubtful leases; and if it affects this question at all, it is in our favour. The words in s. 56, sub-s. 2, "notwithstanding anything in the settlement," mean that the consent of the tenant for life is necessary whether there is anything in the settlement or outside the settlement. If the trustees have powers either under the settlement or outside the settlement, and those powers conflict with those given by the Settled Land Act, the consent of the tenant for life is necessary. So this point does not depend upon whether the Act of 1877 forms part of the settlement. At all events the consent of Sir Charles and Tom T. L. Scarisbrick is necessary to leases under s. 16 of the Act of 1877.

H. Terrell, K.C., and *Henry Wace*, for the infant tenant in

(1) (1883) 24 Ch. D. 129, 139. (2) (1884) 25 Ch. D. 651.

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tail in reversion of Sir Charles Scarisbrick's share, supported the same contention.

T. H. Carson, K.C., and *D. Robertson-Macdonald*, for the infant tenant in tail of William Scarisbrick's share. There are three questions in dispute—(1.) the duration of the powers conferred by the Act of 1877; (2.) the necessity for any consent to the exercise of the powers; and (3.) the conveyance of the legal estate to the beneficiaries.

On the first point it is clear that the powers are still in force in respect of Sir C. Scarisbrick's one-third share in such of the lands as were not comprised in the deeds of 1907; for that part of the estate is still held under the will in trust for successive beneficiaries. The powers continue as long as any of the trusts of any of the shares remain to be performed. Therefore they are still in force in respect of the whole estate: *Trower* v. *Knightley* (1); *In re Brown's Settlement* (2); *Taite* v. *Swinstead*. (3)

As regards the lands comprised in the deeds of 1907, it may be argued that these lands have come home, inasmuch as the life estate of Sir C. Scarisbrick in those lands has been destroyed by the deeds of 1907. But we point out that, if as regards these lands the powers of the 1877 Act do not continue, the only powers of managing them would be those of the Settled Land Act, so that the representatives of all the three shares would have to agree to every sale and every lease. In the interest of the beneficiaries we submit that the Court will endeavour to hold that the powers, which were clearly granted to avoid expense and inconvenience, still continue. It is a question of intention and depends on the object for which the powers were given. Here it is obvious, from the construction of the Act of 1877, that the Legislature intended the powers to continue at least as long as the estate remained undivided. It was essential for the proper development of the estate that all the powers should be kept in one hand.

The doctrine of the duration of powers was developed in a series of cases commencing with *Ware* v. *Polhill* (4) and was

(1) (1821) 6 Madd. 134.
(2) (1870) L. R. 10 Eq. 349.
(3) (1859) 26 Beav. 525.
(4) (1805) 11 Ves. 257.

settled by *Lantsbery* v. *Collier*. (1) But since the last case several exceptions have been introduced to the rule that powers cease when the land comes home—e.g., (1.) an exception where powers are given expressly "for the purpose of division": *Peters* v. *Lewes and East Grinstead Railway Co.* (2); or (2.) an exception where in the case of land held in undivided shares it is important that powers of management should be exercised by one body of trustees: *In re Cotton's Trustees and the School Board for London*. (3) The last-mentioned exception applies in the present case.

As regards a possible objection based on the rule against perpetuities, that cannot apply here, where the powers in question are given by statute: *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (4)

Again, the Act of 1904 has to be read as one with the Act of 1877, and the intention here is clear that the powers should continue.

As regards the second point we submit that no consents are necessary to the exercise of any of these powers in respect of the undivided lands, except those specially mentioned in s. 16 of the Act of 1877. Sect. 56, sub-s. 2, of the Settled Land Act, 1882, does not apply to these powers, for they are not "conferred by the settlement," but by an Act of Parliament which is outside the settlement, inasmuch as it contains no limitations to persons in succession. There is a marked difference between the language of sub-s. 1 and sub-s. 2 of s. 56.

As regards the third point, inasmuch as, if our argument is right, the powers continue and ought in the interests of the beneficiaries to continue, we say that the beneficiaries cannot call for a conveyance of the legal estate: *Trower* v. *Knightley*. (5)

Cave, K.C., and *T. T. Method*, for Sir A. E. H. Naylor Leyland, the infant tenant in tail of that share. We take the same view and adopt the arguments which have been put forward on behalf of the tenant in tail of W. Scarisbrick's share. The Act of 1904 shews that the powers of the Act of 1877 still

(1) (1856) 2 K. & J. 709.
(2) (1881) 18 Ch. D. 429.
(3) (1882) 19 Ch. D. 624.
(4) [1900] 2 Ch. 352, 360; [1901] 2 Ch. 37, 50.
(5) 6 Madd. 134.

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continue, notwithstanding that two of the shares have come home. It is a question of the intention of the donor of the power: *In re Cotton's Trustees and the School Board for London.* (1) Even if the powers of the Act of 1877 have come to an end, the powers of the Act of 1904 continue till the limitations of the resettlements come to an end.

E. S. Ford, for the trustees of the Naylor Leyland resettlement.

WARRINGTON J. stated the facts and held that upon the true construction of the Act of 1877 the powers thereby conferred upon the trustees continued to be exercisable at least so long as any land should remain vested in the trustees in trust for any persons in undivided shares; and that the rule against perpetuities did not affect this question, inasmuch as the powers were granted by Act of Parliament; and said that this decision left open the question whether the powers would continue after partition. His Lordship further held that the consent of Sir Charles Scarisbrick was necessary to the exercise of the powers of s. 16, but that that of Tom T. L. Scarisbrick was not required, as he was not tenant for life under the will and codicil, but under the resettlement, and continued:—

Then it is said that by virtue of s. 56 of the Settled Land Act, 1882, the consents of Sir Charles Scarisbrick and Tom T. L. Scarisbrick are required not only to the exercise of those powers which are covered by s. 16, but to the exercise of all powers conferred by the Act. Sect. 56, sub-s. 1, of the Settled Land Act, 1882, is shortly as follows: "Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting by statute, exercisable by trustees, and the powers given by this Act are cumulative." The effect of that is to preserve absolutely all the powers conferred by the Act of 1877. They are powers for the time being subsisting by statute exercisable by trustees. But that absolute preservation of the statutory powers is qualified by the 2nd sub-section. The 2nd subsection is this: "But in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any

(1) 19 Ch. D. 624, 627.

matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act." Now does that section interfere with the exercise by the trustees of the powers conferred by this Act of Parliament? It seems to me that that depends upon the question whether the Act of Parliament forms part of the settlement which is referred to in the 2nd sub-section. If it does, then the powers of the Act of Parliament are powers conferred by the settlement. If it does not, then the powers conferred by the Act of Parliament would not be powers conferred by the settlement, the qualification introduced by the 2nd sub-section would not apply to those powers, and the absolute preservation provided by the 1st sub-section would continue unaffected.

For the purpose of determining the question whether an Act of Parliament is to be treated as part of the settlement one must look at the definition of "settlement" in the 2nd section of the Act. That is as follows: "Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of Court Roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires." Now does this land or any part thereof stand limited by virtue of the Act of Parliament, or partly by virtue of the Act of Parliament, to persons in succession? The Act of Parliament does not in any way incorporate any part of the will or codicil. It is in terms an enactment which confers upon the persons who happen to be trustees of the will and codicil certain powers which they would not otherwise have, and I can find nothing in the

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Act which in any way affects the limitations of the estates as created by the joint operation of the will and codicil. It seems to me, therefore, that the Act is not an instrument by virtue of which, either by itself or by the joint operation of it and any other instrument, the land settled stands limited to persons by way of succession. If that is so, then the Act is not the settlement or a portion of the settlement as referred to in s. 56, sub-s. 2. The conclusion, therefore, that I come to on that part of the case is that sub-s. 2 is inoperative in the present case, and that the powers of the Act of Parliament are absolutely preserved by the 1st sub-section, and are therefore exercisable without requiring the consent of the persons who are the tenants for life at the present moment under the Settled Land Act. I think I have dealt now with all the questions that arise with regard to consents. [His Lordship said that as long as the powers continued the trustees could not be called upon to convey to the beneficiaries the legal estate in Sir Charles Scarisbrick's share, and continued:—]

I have passed over one point which I ought to refer to, and that is the effect of the Act of 1904. The point with regard to that Act refers to the first of the questions with which I have been dealing, namely, the continuance of the powers. I did not refer to it in dealing with that question because it seemed to me that I was able to come to a conclusion on the construction of the Act of 1877 itself without reference to the Act of 1904. But the Act of 1904 was passed at a time when two of the shares, to use an expression familiar to conveyancers, had come home so far as regards the original limitations of the will and codicil. Notwithstanding that fact, the Act of 1904, which and the principal Act of 1877 are to be read and construed together as forming one Act and are to be cited as the Scarisbrick Estate Act, 1877 and 1904, conferred powers on the trustees for the future, and by the saving clause, clause 11 of the Act of Parliament, expressly bound the persons entitled under the several resettlements. It seems to me, therefore, that at the time when the 1904 Act was passed, and in passing that Act, the Legislature clearly contemplated the continuance of the powers, notwithstanding that as to two of the shares the limitations of the

will and codicil had come to an end. If anything, the Act of 1904 strengthens the view which I have taken as to the construction of the Act of 1877, but I do not think it is necessary to rely upon it for the purpose of coming to that conclusion.

Solicitors: *Rawle, Johnstone & Co., for Woodcock, Stobart & Co., Wigan; Pritchard, Englefield & Co., for Buck, Cockshott & Cockshott, Southport; Vertue & Castle; Collyer-Bristow, Curtis, Booth, Birks & Langley, for Brown, Brown & Murphy, Southport, and Harrisons & Winnall, Welshpool.*

H. C. R.

In re EARL OF EGMONT'S TRUSTS. LEFROY *v.* EARL OF EGMONT.

[1908 E. 142.]

Settled Land—Heirlooms—Capital Moneys subject to same Trusts—Insurance—Power of Trustees to insure Heirlooms and pay Premiums out of Income of Capital Moneys—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 18.

Chattels settled so as to devolve as heirlooms with settled land are "insurable property" within the meaning of sub-s. 1 of s. 18 of the Trustee Act, 1893.

Where under a settlement heirlooms are settled so as to devolve with the settled land, and the trustees have in their hands capital moneys subject to the same trusts, the trustees have power under s. 18 of the Trustee Act, 1893, to insure the heirlooms against loss by fire, and to pay the premiums for such insurance out of the income of the capital moneys in their hands.

ORIGINATING SUMMONS.

By an indenture of resettlement dated August 15, 1889, the English estates of the Egmont family were reappointed to uses in strict settlement under which the present Lord Egmont is legal tenant for life without impeachment of waste, but determinable as therein mentioned. By the settlement certain leaseholds were limited and appointed to the trustees to be held by them upon trusts corresponding with the uses declared of and concerning the freeholds, or as nearly thereto as might be, following the common

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form. By the fourth witnessing part the settlors directed and appointed that certain moneys, stocks, funds, and securities should so soon as circumstances would permit be paid, transferred and assigned, or otherwise vested at law in the trustees, and should be held by them upon and for the trusts and purposes and with and subject to the powers and provisions upon, for, and with and subject to which the same would have to be or ought to be held in case as regards the said moneys they were capital moneys produced by a sale or sales of the thereinbefore appointed hereditaments or parts thereof made for the purposes of that settlement in pursuance of the power of sale incident thereto by virtue of the Settled Land Act, 1882, and in case as regards the said stocks, funds, and securities they were temporary investments of or for moneys produced as last aforesaid. By the fifth witnessing part the settlors appointed that certain plate, jewels, pearls, and family portraits thereinafter referred to as "the settled heirlooms" should so soon as circumstances would permit be delivered to or otherwise vested at law in the trustees thereof, and should be held by them in trust to permit and suffer the same to be used and enjoyed as heirlooms so long and so far as the rules of law and equity would allow by the person who for the time being should by virtue of the limitations thereinbefore contained be entitled to the immediate freehold of the thereby appointed freehold hereditaments, but so nevertheless that the same should not vest absolutely in any person thereby made tenant in tail male by purchase, unless such person should attain the age of twenty-one years, but on the death of such tenant in tail male by purchase under the age of twenty-one years the settled heirlooms should go, devolve, and remain as if the same had been freeholds of inheritance comprised in the appointment first thereinbefore made. The settlement contained no directions as to the insurance of the settled heirlooms.

George Drummond Ince Perceval was the first tenant in tail in remainder under the resettlement at present in existence.

In 1897 questions arose with reference to the settled heirlooms, and an originating summons was taken out by Lord Egmont asking that an inquiry might be directed of what the chattels and effects described in the settlement as "the settled heirlooms"

consisted, and that an inventory thereof might be made and signed, and for a transfer to him of the possession and custody of the settled heirlooms.

On February 14, 1900, an agreement was arrived at between the parties under which the chattels were divided into certain groups, one of which was to be delivered to Lord Egmont. That agreement was carried into effect by an order dated July 25, 1900, which directed that the heirlooms specified in the inventory which had been signed by the parties should be handed over to Lord Egmont, and it was declared that the chattels so to be handed over to him should be considered as heirlooms and should be from time to time enjoyed by the person who should be in possession of the estates settled by the settlement of August 15, 1889, so far as the same might by the rules of law and equity be so limited. These chattels were shortly afterwards handed over to Lord Egmont, who had been in possession of them ever since. Neither the agreement nor the order contained any directions as to the insurance of the heirlooms so to be handed over.

The trustees had applied to Lord Egmont to insure the heirlooms, but he had declined to do so.

This summons was taken out by the present trustees of the settlement, who were also trustees for the purposes of the Settled Land Acts, against Lord Egmont and G. D. I. Perceval, the present tenant in tail in remainder, for the determination by the Court of the question (inter alia) whether the trustees, as the trustees of the settlement, had or had not the power to insure the settled heirlooms comprised in the settlement against fire and burglary or against fire only, and to pay the premiums necessary for effecting and keeping on foot the policies of insurance out of the income of the moneys, stocks, funds, and securities in their hands subject to the trusts of the settlement.

Rowden, K.C., and *E. S. Ford*, for the summons. The duty of a trustee in reference to insuring the property was until recently not very clearly defined; it was conceived that under special circumstances, and in the due course of management, he would be justified in insuring; but that where there was a tenant for life he could not be advised to do so out of the income without the

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tenant for life's consent: Lewin on Trusts, 11th ed. p. 702. Now, however, by s. 18 of the Trustee Act, 1893 (1), a trustee may insure against loss or damage by fire any building or "other insurable property," and pay the premiums of such insurance out of the income thereof or out of any other property "subject to the same trusts," without obtaining the consent of any person who may be entitled wholly or partly to such income. It is submitted, in the first place, that the settled heirlooms are clearly "insurable property" within the meaning of sub-s. 1 of that Act. Then are the capital moneys in the hands of the trustees held "subject to the same trusts" as the heirlooms? It is true that the heirlooms produce no income whilst they exist as chattels, but if they are sold the proceeds of sale would be capital money for all purposes: Settled Land Act, 1882, s. 37, sub-s. 2; *In re Duke of Marlborough's Settlement.* (2) If this were a case in which a tenant for life was applying to the Court to be let into possession of the settled estates, the Court would make it a term of letting him into possession that he should insure the heirlooms: *In re Wythes.* (3)

Sect. 7, sub-s. 1, of the Trustee Act, 1888, which is now superseded by s. 18, sub-s. 1, of the Trustee Act, 1893, merely authorized the trustees to insure the trust property. The alteration of the wording of the latter sub-section is significant as shewing that now it is the duty of the trustees to insure.

Bryan Farrer, for the remainderman. If the words "subject

(1) The Trustee Act, 1893, s. 18, provides:

"(1.) A trustee may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income.

"(2.) This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

"(3.) This section applies to trusts created either before or after the commencement of this Act, but nothing in this section shall authorize any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust."

(2) (1886) 32 Ch. D. 1.

(3) [1893] 2 Ch. 369.

to the same trusts" in sub-s. 1 of s. 18 do not mean "similar trusts" the trustees would have no power to insure the settled leaseholds, as the settlement contains no express power entitling them to do so, and settled leaseholds, vesting as they do in the first tenant in tail who attains twenty-one, are not held on the same trusts as money liable to be laid out in the purchase of land.

H. Terrell, K.C., and *C. S. Medd*, for Lord Egmont. Heirlooms are not "insurable property" within the meaning of sub-s. 1 of s. 18, as in the event of their destruction by fire they could not be replaced. An insurance merely ensures compensation for that which can be replaced. Apart from the Trustee Act, 1893, the trustees have no power to insure heirlooms, and there is no obligation on the tenant for life to do so. All that a tenant for life of heirlooms can be required to do is to sign an inventory of them, unless there is reason to suppose that the heirlooms will be in danger in his possession: *Temple* v. *Thring*. (1) In *In re Wythes* (2) the circumstances were totally different from those in the present case, and the order in that case appears to have been made by consent.

Further, s. 18 of the Trustee Act, 1893, does not apply to a case like the present, inasmuch as heirlooms of this nature cannot strictly be settled on the same trusts as real estate, and as the capital moneys in the hands of the trustees must be regarded as real estate, the income arising from the securities on which they are invested cannot be applied in payment of the premiums on their insurance. Lord Egmont might to-morrow require the trustees to invest the capital moneys in the purchase of land. The section was intended to apply only to a case where the trustees held property producing income out of which they could pay the premiums of insurance, and not to include property like the heirlooms in the present case, which produce no income.

WARRINGTON J. stated the facts and continued: The chattels having been delivered to Lord Egmont, but he, for some reason which is not quite apparent, having refused to insure them, the question arises whether the trustees can insure them,

(1) (1887) 56 L. J. (Ch.) 767. (2) [1893] 2 Ch. 369.

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and, if they do so, whether they are entitled to pay the insurance premiums out of the income of the capital moneys in their hands, to which Lord Egmont is entitled. Now that question really depends upon the true construction of s. 18 of the Trustee Act, 1893, which provides (sub-s. 1) that "A trustee may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property." Pausing there for a moment, it has been contended that the heirlooms are not "insurable property." Apparently the meaning of that contention is that the pretium affectionis attaching to heirlooms is not insurable. But the heirlooms are nothing but chattels; it is not the pretium affectionis that is insured, but the chattels; and the chattels are "insurable property." What may be the value of those chattels is another matter; but the chattels themselves are insurable property, and they are none the less insurable because they may be extremely ancient and may be things to which the family attribute great importance, and things the antiquity and the importance of which cannot commensurably be represented by the amount of the policy moneys. Then comes (to go back to the sub-section) the direction with regard to the payment of premiums, "and [may] pay"—that is reading in the word "may" in the first part of the sub-section—"the premiums for such insurance out of the income thereof"—meaning, of course, of the property insured—"or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income." Then sub-s. 2 provides that "This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so." I take it that "property" there means the insurable property referred to in sub-s. 1—that is to say, the sub-section limits the power of the trustees as to insuring insurable property. If they have insurable property in their hands which they are bound to convey or deliver to a particular person absolutely, then there is no object in their insuring it; the person to whom they are

bound to deliver it is the absolute owner of it, and, if he does not choose to insure it, there is no reason why the trustees should do so. That, in my opinion, is what is meant by the reference to "property" in that sub-section.

Now that reduces the question to the very simple one, Are the capital moneys in the hands of the trustees for the purposes of this section subject to the same trusts as the heirlooms? In one sense, of course, they are not, because the heirlooms cannot be sold without the sanction of the Court; but when they are sold, the proceeds are subject to exactly the same trusts; and the actual chattels, so long as they remain chattels, devolve with the freeholds, subject, of course, to this, that they do not vest absolutely in the tenant in tail until he attains twenty-one. But, in my judgment, what is meant by s. 18, sub-s. 1, is that one is not to look at small details of variation between the trusts of the several properties which are referred to. If the properties are of different natures, one must in that case inevitably find some differences in the trusts. I think what the section means is, Are they held substantially upon the same trusts so that substantially the same persons are entitled to them? I do not say that "the same trusts" apply only to income; but one of the things which one has to consider in determining whether the trusts are the same is whether the income or the like enjoyment of the two properties is identical. In this case it seems to me that it is. So long as the chattels remain in specie, of course they produce no income; but the tenant for life is entitled to their possession and to their enjoyment, the enjoyment being, in this case, their possession, and not the income produced; but if they were sold, then the income of the funds produced by the sale would be payable in exactly the same way as the income of the capital moneys.

It seems to me, therefore, that the capital moneys for the time being subject to the settlement are, on the true construction of this section, for all practical purposes held upon the same trusts as the heirlooms, and I think, therefore, that the proper conclusion to arrive at is that the chattels are "insurable property" within the meaning of sub-s. 1 of s. 18, and that the income of the capital moneys in the hands of the trustees are

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applicable to the payment of premiums. I think, therefore, that the trustees have, under s. 18, power to insure the heirlooms against fire and to pay the premiums for such insurance out of the income of the capital moneys in their hands.

Solicitors: *Littledale & Lefroy; Arnold & Henry White; Nash, Field & Co.*

W. I. C.

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In re POYSER. LANDON *v.* POYSER.

[1907 P. 2834.]

Will—Construction—Shares of Residue—Advances in Lifetime of Testator—Subsequent authorized Advances by Trustees—Hotchpot—Power to postpone Conversion—Principle for ascertaining Income pending Distribution.

A testator by his will gave his residuary real and personal estate to trustees upon trust to sell and convert and to divide the proceeds into fifteen equal shares, and to distribute them among his eight children as therein mentioned, the daughters' shares and portions of the sons' shares being settled. And the testator declared that for the purpose of ascertaining the shares certain advances of varying amounts which he had made to some of his children and certain payments which he authorized his trustees to make after his death should (with interest at 4 per cent. in certain cases from the date of his death or from the date of payment as the case might be) be debited against the shares of the children so advanced. And he gave wide powers to his trustees to postpone the conversion of his estate, and directed that the actual intermediate income should be paid to the tenants for life. The estate of the testator at his death in 1901 consisted largely of shares in companies, the dividends on which, as also the capital value, had been subject to great fluctuations:—

Held, that for the purpose of dividing the income pending the division of the capital of the estate interest at 4 per cent. ought, in cases where the testator had directed that such interest should be debited, to be added to the actual income for the time being, and the aggregate so arrived at ought to be divided into fifteen shares and distributed among the children, subject in the case of each advanced child to a deduction of the interest on his advance or on the payment made to him.

In re Hargreaves, (1903) 88 L. T. 100, explained and distinguished.

ADJOURNED SUMMONS.

Josiah Thomas Poyser, by his will dated March 27, 1901, after appointing executors and making certain specific devises and

bequests, devised and bequeathed the residue of his real and personal estate to his trustees upon trust to sell and convert and (clause 10) out of the money to arise from such sale and conversion to pay his funeral and testamentary expenses and debts and the legacies and annuities thereby given.

By clause 11 the testator provided that, subject as aforesaid and to the directions thereinafter contained for the ascertainment and retention of the shares of his children in his residuary estate and to the trusts and provisions thereinafter declared concerning such retained shares, the trustees should stand possessed of his residuary estate in trust for such of his five sons, Edwin Josiah Poyser, Frederick Thomas Poyser, Henry Crisp Poyser, John Crisp Poyser, and Edgar Unwin Poyser, and his three daughters, Eleanor Anne, the wife of Francis James Jennings, Alice Mary, the wife of Robert Finlay Beard, and Elsie Beatrice Poyser, as should survive him in equal shares, save that the entire share of each of his children other than Henry Crisp Poyser should be double the share of Henry Crisp Poyser.

Clause 12 was as follows: "Subject as aforesaid the following provisions for the purpose of ascertaining the shares of my children in my residuary estate shall have effect namely (1.) I direct that the sum of 10,000*l.* covenanted by me to be paid to the trustees of the marriage settlement of the said John Crisp Poyser be paid according to the tenor of that covenant as soon as may be after my death and that the amount so paid be accounted for and debited against the share of the said John Crisp Poyser in my residuary estate. (2.) I direct that the sum of 2500*l.* advanced by me to the said Francis James Jennings in the year 1897, if unpaid at my death, shall not be charged or claimed as a debt, but shall together with interest from my death at the rate of 4*l.* per cent. per annum, but down to my death without interest, be accounted for and debited against the share of the said Eleanor Anne Jennings in my residuary estate. (3.) I direct that the sum of 707*l.* 12*s.* 6*d.* paid by me to Lloyds Bank Limited in the year 1898, under and in discharge of a guarantee given by me to the said bank on behalf of the said Robert Finlay Beard (if not repaid by him before my death) shall not be charged or claimed as a debt but

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shall together with interest from my death at the rate of 4*l.* per cent. per annum, but down to my death without interest, be accounted for and debited against the share of the said Alice Mary Beard in my residuary estate. (4.) Whereas my said son Henry Crisp Poyser now is (or but for his bankruptcy would be) indebted to Frederick George Mayhew of Saxmundham in the County of Suffolk solicitor or to his firm in the sum of 1465*l.* 10*s.* 6*d.* or thereabouts and the said Frederick George Mayhew or his firm holds as security for the said sum a policy upon the life of the said Henry Crisp Poyser and whereas I am desirous that the said Frederick George Mayhew or his firm shall be repaid the said sum of 1465*l.* 10*s.* 6*d.* with interest at the rate of 5*l.* per cent. per annum Now I declare that if at the time of my decease the said Henry Crisp Poyser shall be (or but for his bankruptcy or the operation of any Statute of Limitations would have been) under any liability to the said Frederick George Mayhew, his executors administrators or assigns, or his firm in respect of the said sum of 1465*l.* 10*s.* 6*d.* or any part thereof and the interest thereon or on any part thereof then and in such case the trustees or trustee shall be at liberty to pay to the said Frederick George Mayhew his executors administrators or assigns or to his firm in or towards satisfaction of the said sum of 1465*l.* 10*s.* 6*d.*, or any part thereof, and the interest thereon or on any part thereof such a sum as the trustees or trustee shall in their absolute and uncontrolled discretion think fit due regard being had to any security which the said Frederick George Mayhew or his executors administrators or assigns or his firm may hold. And I direct that any sum which the trustees or trustee shall so pay shall be accounted for and debited against the share of the said Henry Crisp Poyser in my residuary estate. And I expressly authorize the trustees or trustee in their absolute and uncontrolled discretion to determine whether any and if any what sum shall be paid to the said Frederick George Mayhew his executors administrators or assigns or his firm as aforesaid And I declare that such determination shall be conclusive and binding upon all persons interested under my said will or any codicil thereto. And (5.) I direct that no other advances or gifts at any time made by me

to any of my children shall be accounted for or debited against the shares of any of them in my residuary estate for any purpose whatsoever."

The testator then proceeded to settle the several shares. With regard to his sons other than Henry Crisp Poyser he directed that a moiety of his share should be paid to each son absolutely, and that the other moiety should be settled upon trust to pay him the income thereof for life and after his death upon such trusts as he should appoint in favour of his wife and family. He then settled his daughters' shares on similar trusts, except that the whole and not merely a moiety of each share was to be settled, and directed that the share of his son Henry Crisp Poyser, who had been declared bankrupt, should be held upon certain trusts for the benefit of himself and his family.

By clause 35 the testator declared that, notwithstanding anything thereinbefore contained, it should be lawful for the trustees to defer and postpone the sale and conversion and collection of the whole or any part or parts of his residuary real and personal estate thereinbefore devised and bequeathed in trust for sale respectively so long as they should in their uncontrolled discretion think proper.

And by clause 38 he declared that until all the real and personal estate thereinbefore devised and bequeathed in trust for sale respectively should have been sold or converted in pursuance of the trusts and powers thereinbefore contained the rents and profits and income of the particulars for the time being composing the same, whether wasting or terminable or speculative (after payment of all such outgoings as the trustees or trustee shall think fit to pay), should be paid and applied to the persons for the purposes and in the manner to whom and for and in which the income of the stocks, funds, and securities in or upon which the moneys to arise from the sale thereof were thereinbefore directed to be invested would be payable or applicable under the trusts therein contained in case the sale and investment aforesaid were then actually made, and that the several persons for the time being entitled for life or otherwise to the income of the ultimate residue of his estate or of any share therein should be considered entitled to such income from the

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day of his death, and that no part of such income should be added to capital.

The testator died on May 10, 1901, and his will was duly proved by all the executors on June 27, 1901.

All the eight children of the testator named in the will survived him, and under the provisions of clause 11 thereof the estate became divisible into fifteen equal shares, each child other than Henry Crisp Poyser taking two shares, and Henry Crisp Poyser one share only.

At the death of the testator the sum of 1465*l.* 10*s.* 6*d.* mentioned in sub-clause 4 of clause 12 of the will remained unpaid. In 1902 the trustees paid to Mayhew the sum of 691*l.* 18*s.* 2*d.*, being the balance unpaid after the realization of the security held by him, and also paid legacy duty amounting to 12*l.* 4*s.* 7*d.* on such sum.

The 10,000*l.* mentioned by the testator in sub-clause 1 of clause 12 of the will had not been paid by the trustees.

The testator's estate, which was estimated for probate at 237,180*l.* 3*s.* 7*d.*, consisted principally of shares in limited companies. The income of the estate had been subject to great fluctuations, as had also the capital value of the estate.

The trustees had realized and got in a considerable part of the estate, but were desirous of postponing the realization of the remainder, and were unable as yet to divide it in exercise of the power of appropriation contained in the will.

A question having arisen as to what, having regard to clause 12 of the will, was the correct principle of calculating the amount of income payable on each share, the trustees took out the present summons for the determination (inter alia) of the following questions:—

"1. Whether for the purpose of the division of the actual income of the testator's residuary real and personal estate pending the division thereof interest at 4 per cent. per annum from the testator's death or from the date of payment thereof (as the case may be) on the sums by clause 12 of the will directed to be accounted for and debited (*a*) with interest and (*b*) without any mention of interest ought to be added for computation to the actual income of the estate for the time

being and the aggregate amount of income so arrived at ought to be divided into equal one-fifteenth shares and paid to the beneficiaries subject as to the income of the shares against which any sums are directed to be debited to the deduction of that interest on such sums respectively.

"2. Or, whether the principal sums directed to be accounted for and debited as aforesaid together with interest at the rate aforesaid (*a*) from the testator's death on such of the sums as are directed to be accounted for and debited with interest (*b*) on the other sums from the date of payment thereof respectively down to the date of such division as aforesaid (or alternatively, without interest on such other sums) ought to be added for computation to the capital of the estate, and deducted from the shares against which the same respectively are directed to be debited in the aggregate amount of capital so arrived at and the annual income ought to be divided as from the testator's death between the persons for the time being entitled to income in the proportions of the respective shares of capital so arrived at."

Wace, for the summons.

Rowden, K.C., and *E. A. Jennings*, for children entitled to shares in respect of which no advance or payment had been made. The principle upon which the income ought to be divided is that stated in question 2 of the summons. The case comes within *In re Hargreaves.*(1) That case shews that the principle on which the income ought to be divided is to divide the actual income among the children according to the fractions of the estate to which they are each respectively entitled. To ascertain what those fractions are the value of the estate must be ascertained as at the date of the testator's death, and to that must be added the total amount of the advances, and the aggregate sum will form the denominator of the fractions. The numerators will be the amounts of the shares less in the case of an advanced child the amount of his or her advance. Each child will thus take the income of his particular share and not a share of the income, and the computation of interest on advances will be unnecessary.

(1) 88 L. T. 100.

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T. Bateman Napier and *G. R. Blanco White*, for persons entitled in the same interest.

Levett, K.C., and *J. K. Young*, for a child who had received an advance on his share. The true theory is that embodied in question 1 of the summons. In *In re Hargreaves* (1) the decision turned upon the particular form of the hotchpot clause in that case. There the testator expressly stated that the value of his estate was to be ascertained as on the day of his death. And of course, if the Court can say, as in that case it could, what are the values of the particular shares which the testator has given, it is not necessary to compute interest on advances. Here the testator contemplated that his estate would not be realized for some time after his death. This is particularly shewn by clause 38 of the will. Consequently the value of the shares cannot now be ascertained. In *In re Hargreaves* (1) the Court of Appeal did not intend to lay down any general rule, and the statement in Theobald on Wills, 7th ed. p. 777, as to the effect of that decision requires qualification. The case has no application to the present will.

J. Gatey, for a child of an advanced child, supported the same contention. *In re Hargreaves* (1) may govern this case when the capital of the estate comes to be divided. That case was recently followed by Neville J. in *In re Gilbert.* (2)

H. Terrell, K.C., and *E. de Witt*, and *T. H. Carson, K.C.*, and *C. J. Parton*, for other parties to the summons, took no part in the argument on this point.

WARRINGTON J. The question raised by questions 1 and 2 of the summons, which is the question with which I have now to deal, is really in what manner the income of the testator's residuary estate ought to be dealt with having regard to certain hotchpot provisions in the will. The two theories cannot, I think, be better stated than they are in questions 1 and 2 of the summons. The first question is. [His Lordship read the question and continued:—] In other words, the theory on which that question is founded is that for the purpose of dividing the income you add to the actual income of the estate the interest which the

(1) 88 L. T. 100. (2) [1908] W. N. 63.

testator has directed to be brought into account, and then you divide the aggregate amount of income so arrived at into as many shares as there are shares of the capital, and of course debit against each share the interest which in respect of that share has been added for the purpose of computation. That is the one theory. The other theory is that expressed in question 2 of the summons. [His Lordship read the question and continued :—] In other words, you do not divide the income at all, but you find out the actual shares of capital by adding for the purposes of computation of the entire estate the amount of the advances either with or without interest, as the case may be, then debiting the several amounts so added against the particular shares in respect of which they have been added, and then you will get shares, the numerator of which will be the amount of each, the denominator of which will be the total value of the estate, and then divide the income in those proportions.

The question is which is the right theory to adopt. I must first read the will, because after all the question really is what did the testator intend. [His Lordship then stated the provisions of the will and dealt in detail with the various directions contained in clause 12, pointing out that in the case of each advance what the testator had directed to be brought into account was the amount of the advance or payment together with interest either from the date of his death or from the date of the payment by the trustees, as the case might be, thereby shewing that the sums to be debited against the advanced shares were sums which could not be ascertained until some period subsequent to the date of his death. He continued :—] Now on that will what is it that the testator has directed with regard to hotchpot? Has he directed that at the moment of his death there should be an immediate notional distribution with the bringing into account of the sums to which the hotchpot provisions relate? I think he has. I need not repeat what I said in the course of reading the will. I think that what the testator had in his mind was that the actual division of his estate would be postponed for some time after his death, and that it would be necessary, therefore, to bring into account under the hotchpot provisions interest

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on those sums which were to be brought into account in the manner in which he has directed.

The argument put forward in support of the theory expressed in the second question of the summons is founded entirely on *In re Hargreaves.* (1) What Mr. Rowden said in support of his contention was that this case came within *In re Hargreaves* (1), and that if it did not, then his contention could not be supported, as it would if this case did come within that decision. For the purpose of determining the point it is necessary to look without reading it at what it was that was actually done by the will in *In re Hargreaves* (1) and what it was the Court of Appeal ultimately decided and how their decision was arrived at. In that case (2) a large annuity was given to the testator's widow which required a considerable portion of the income of the testator's estate to pay it. Subject to that annuity the estate was given in much the same manner as it is here, that is to say, it was to be divided into as many shares as there were children, and each share was to be held upon certain trusts for the benefit of each child, but the hotchpot clause in that will was a somewhat peculiar one. Taking the last part of the clause, which is the important part, it was expressed in these terms: "The sum or sums so advanced or covenanted to be advanced"—that is in reference to the marriage settlements of some of his children—"should be treated as part of the capital of the original share, the annual income of which was thereinbefore directed to be paid or applied to or for the benefit of such son or daughter, and in fixing the amount of such original share the same sum or sums should be brought into hotchpot and accounted for accordingly"—and then this, which is of the greatest importance—"and for that purpose any such stock, funds, or securities should be treated as of the value thereof at the average price of the day on the day of his death." The only question that was really argued before Joyce J., as far as one can judge from the report, and from his judgment, was whether the interest with which the advances were to be charged was to be at the rate of 4 per cent. or, as the trustees had charged it, at a rate varying according to the average income of the estate; and he held on that will that

(1) (1902) 86 L. T. 43; 88 L. T. 100. (2) 86 L. T. 43, 44.

the advances were to be charged with interest at the rate of 4 per cent. The case went to the Court of Appeal, and what the Court there held was that no interest was to be charged at all, but that the value of the estate was to be taken as it was at the date of the death, and to that there was to be added, as the testator had directed, the sums paid or covenanted to be paid at the value at the date of the death, and then that the whole amount of the estate so arrived at was to be divided into the proper number of shares, debiting, of course, afterwards each share with the amount which in respect of that share had been added for the purposes of computation. You then got in a concrete form the values of the several shares to which the children were entitled, and that is what the testator had told you to do. Then, having got that, of course it followed that you would divide the income in proportion to those shares. Now I think it is quite plain that the foundation of the judgment of the Court of Appeal in *In re Hargreaves* (1) is what I have said, namely, that the testator had there said "You shall divide as at my death and according to the state of affairs at my death." This appears in all the judgments. First, the Master of the Rolls, now Lord Collins, says (2): "So far as this case turns on a question of Chancery practice I shall not venture to give an opinion upon it, but so far as it is a mere question of the construction of the will it seems to me there is no real doubt whatever that the testator here intended the rights of the parties to be ascertained at his death; and if the rights of the parties are to be ascertained at the testator's death, it seems to me that, as a question of arithmetic, the principle is unimpeachable which was referred to by Romer L.J. in the course of the argument, and which he will re-state and explain further presently." Then Romer L.J. begins his judgment by saying (2): "I think there is no real difficulty in this case, for it must be borne in mind that on the face of this will it is clear that the rights of the children inter se are fixed at the date of the death of the testator. The testator has clearly said that at his death the advances he has made to the different children shall be brought into account as against the share of the child advanced, and it must not be forgotten that here no tenancy for

(1) 86 L. T. 43; 88 L. T. 100. (2) 88 L. T. 100.

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life is created, but the shares are given to the children at the death of the testator, and the trusts are declared of each child's share when the child's share is settled as from the death. Therefore, to my mind, it is very clear that if any question arises as between the children as to what their shares are, what burthens have to be borne by each share inter se, the matters must be considered as they stood at the death of the testator." Then, applying that principle to the case before them, he says, what is obvious, that there is no difficulty. There is no question of any supposed computation of interest; all you have to find is what is the state of things at the death and apply that. Cozens-Hardy L.J. says exactly the same thing. He begins his judgment by saying (1): "On the language of this will I cannot doubt that an actual ascertainment of the shares as from the moment of the testator's death was contemplated. The hotchpot clause contains an express provision that the securities that are to be brought into hotchpot are to be ascertained at the average price of the day at his death. It would be very singular indeed if part were to be ascertained in that way and the rest not." So that all three judgments, including particularly the judgment of Romer L.J., in which the result, or rather the application of the principle, is stated in detail, are founded on this, that the estate was to be divided at the date of the death of the testator, and therefore there was no necessity for computation of interest.

Now it seems to me that that distinguishes *In re Hargreaves* (2) from the present case, and, what is more, I think it shews that that case was not intended to lay down any general rule. The decision there was founded on the fact that the state of things was to be ascertained at the death and not at a later period. I think, therefore, that I am quite unfettered by any authority so far as that case is concerned. No other authority has been cited, and I do not think I can give effect to the testator's will except by acceding to the theory propounded in the first question of the summons, namely, that for the purpose of ascertaining the shares of income you must divide the income itself, and for the purpose of dividing the income you must bring into account,

(1) 88 L. T. 101. (2) 88 L. T. 100.

as the testator has told you to do, the interest on the advances, and where any payments are made interest on such payments, of course for the purpose of computation, you add this interest to the total income, and then you divide the total income into fifteenths, debiting against each share the amount which in respect of that share has been added for the purposes of computation. The details will require some working out, and I understand that there are other questions which will arise subsequently with respect to that, but in principle it seems to me that the first question of the summons expresses the correct theory.

Solicitors: *E. F. & H. Landon; Lumley & Lumley; Drake, Son & Parton.*

W. I. C.

Followed. Re FISON'S WILL TRUSTS. [1950] 1 All E.R. 501.

Followed. In re FISON'S WILL TRUSTS [1950] 1 Ch. 394

In re WILSON. WILSON *v.* WILSON.

[1908 W. 98.]

Will—Mortgage—Land subject to Incumbrances—Option to Purchase—Interest of Donee of Right of Pre-emption—Devisee—Person claiming through the deceased Person—Vendor and Purchaser—Real Estate Charges Act, 1854 (*Locke King's Act*) (17 & 18 *Vict. c.* 113), *s.* 1.

The testator devised and bequeathed his residuary real and personal estate to trustees upon trust for sale and conversion, and directed that they should allow his son the option of purchasing two houses forming part of his real estate for 450*l*. The two houses were subject to a mortgage for 300*l*. The son gave notice to the trustees of his intention to exercise the option, and took out a summons to determine whether the option gave him a right to a conveyance free from incumbrances:—

Held, following *Given* v. *Massey*, (1892) 31 L. R. Ir. 126, that the son was not an heir or devisee, and therefore s. 1 of the Real Estate Charges Act, 1854 (Locke King's Act), did not apply, and he was entitled to have the property conveyed to him free from the mortgage.

ADJOURNED SUMMONS.

The testator, Ahab Wilson, by his will dated September 1, 1890, after giving a legacy to his wife, devised and bequeathed two houses known as Stanley Villas and all other his real and personal estate

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to trustees upon certain trusts under which his widow was to be entitled to receive the income during her life, she thereout paying the interest of all principal moneys secured on the real estate. After her death or marriage the trustees were to hold the property upon trust for sale and conversion and to stand possessed of the proceeds upon trust for all his children who should attain twenty-one, or, being daughters, should marry.

On December 13, 1893, the testator made a codicil to his will, of which the material part was as follows:—

"This is a codicil to the last will and testament of me Ahab Wilson of Stanley Villas, Over, in the county of Chester, sawyer, which will bears date the first day of September, one thousand eight hundred and ninety. I direct the trustees of my said will to allow my son Frank the option of purchasing at the death of my wife my two freehold dwelling houses known as Stanley Villas, Over, and the garden and land held therewith all belonging to me for the sum of four hundred and fifty pounds but I declare that my said son shall exercise the right of pre-emption hereby given to him within four months after the death of my said wife."

The testator died on December 25, 1893, and his widow died on November 27, 1907. The property called Stanley Villas was subject at the date of the codicil, and was still subject, to a mortgage for 300*l.* On December 17, 1907, Frank Wilson exercised his option by giving notice to the trustees of his intention to buy Stanley Villas for 450*l.*, and he took out a summons to determine the question whether the option to purchase the houses was an option to purchase them free from the incumbrances existing thereon at the date of the testator's death, or subject thereto.

A. Fairfax Luxmoore, for the summons. The plaintiff is entitled to have this property conveyed to him free from incumbrances at the price of 450*l.* He is not a cestui que trust, but a purchaser. As soon as he gave the notice exercising the option he had a contract with the trustees for the purchase of the houses. He is not an "heir or devisee" within s. 1 of Locke King's Act. He does not take the property under the will, but

by contract. The section only applies to the heir or devisee, not to a purchaser; and the testator has signified his intention that it shall not apply in this case. It has been held that the section does not apply to an option to purchase at a fixed price: *Given* v. *Massey* (1), which is cited as an authority in Carson's Real Property Statutes, p. 430, and Theobald on Wills, 7th ed. p. 175.

J. G. Wood, for the defendants. *Given* v. *Massey* (1) is indistinguishable, but we ask your Lordship not to follow it. The Master of the Rolls in that case stopped short at the words of the section "heir or devisee," whereas the question really turns on the later words, "but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable." The plaintiff is claiming through or under the deceased person. He claims a bounty or privilege under the will and codicil. True, he is not the heir or devisee, but he gets the right to take the property at a particular value. The codicil operates as a devise of the houses to the plaintiff subject to payment of 450*l.*, and the property devised is primarily liable to the payment of the incumbrances.

No reply was called for.

WARRINGTON J. This is certainly a curious case and one on which there appears to be no authority except the decision of Porter M.R. in Ireland, which is directly in point; and what I am in fact asked to do is to say that in my opinion that decision is not correct. The testator gives to one of his sons an option to purchase part of his property which is subject to a mortgage, and the question is whether, when the son exercises that option, he is entitled to have a conveyance free from incumbrances, or is in fact only a purchaser of the equity of redemption and bound to discharge the incumbrances. It is said on behalf of the general estate that he is bound to take the property subject to the incumbrances by virtue of Locke King's Act. [His Lordship stated the facts and continued:—] The son has exercised his option, and the question is whether he is entitled to say that the mortgage shall be discharged out of the estate and the property conveyed to him free from incumbrances. The

(1) 31 L. R. Ir. 126.

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point arose exactly in *Given* v. *Massey*. (1) The facts in that case were these. The testator devised and bequeathed all his estate, real and personal, to trustees upon trust for sale and conversion, and he then directed as follows: "I declare that the said Robert Loughrey shall have the option of purchasing part of the lands of Straw and part of the lands of Bonnanaboigh . . . . at the price of 1400*l*., such option to be declared in writing within three months after my death." These lands were subject to a judgment for 180*l*. and a mortgage for 450*l*. The testator then directed his trustees on payment of the 1400*l*. within six months after his death "to assure the same hereditaments and premises to the said Robert Loughrey, his heirs and assigns, or as he shall direct." Pausing there for a moment, there is in the present case no direction for the conveyance of this property, and that omission is in my opinion favourable to the contention of the son. The Master of the Rolls says (2): "There are no words purporting to devise the Straw and Bonnanaboigh property to Loughrey at all. It is plain that what the testator meant was that all his property should be sold; and that if Loughrey chose, he, and no one else, should be the purchaser of the lands at Straw and Bonnanaboigh at a fixed price; but I can see no indication of any intention that Loughrey should, when once the price was agreed to by him and paid, be on a different footing from any other purchaser. If he did not buy, the lands would have to be sold to some one else. On the language of this will, it is clear that the testator meant that Loughrey was to be a purchaser, and nothing else—a favoured purchaser no doubt, but still a purchaser. The element of bounty does enter into the matter; but the bounty conferred is the right to become a purchaser on advantageous terms, and not a devisee of the estate. And I may observe in passing that the idea of bounty would be entirely frustrated by a construction which would subject Loughrey to a burthen in respect of incumbrances which might render the bargain a losing one on his part."

The words of that part of the judgment apply to the facts in the present case, and the question is whether the decision is right. So far as construction is concerned this case is even

(1) 31 L. R. Ir. 126. (2) 31 L. R. Ir, 130.

stronger in favour of the purchaser than that before the Master of the Rolls. The words here are only "I direct the trustees of my said will to allow my son Frank the option of purchasing at the death of my wife my two freehold dwelling houses known as Stanley Villas, Over, and the garden and land held therewith all belonging to me for the sum of 450*l.*," with a limit of time during which the son may exercise his right. Reading that power in connection with the trust for sale and conversion which is given to the trustees, the trustees, having that power to sell to any one they please, are bound in the first place to offer this property to the son. If he desires to have it and if he exercises his option, in my opinion he elects to become a purchaser and must be taken to have made an offer to the trustees which they are bound to accept and must be taken to have accepted. If they do not expressly accept it, it will be taken by intendment of law that they have done so as if it was their duty to do so. Thus it will be inferred from the facts that there is a contract by the trustees to sell and by the son to purchase the houses. It is said that that is not enough, because the son is a person claiming through or under the testator and can only take this property subject to existing charges under Locke King's Act (17 & 18 Vict. c. 113), s. 1. The words of the Act so far as material are these.

Sect. 1. "When any person shall, after the 31st day of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof. . . . ."

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I need not read further. The Master of the Rolls in Ireland came to the conclusion that it would be improper to treat a person in this position as a devisee of the property, and, therefore, that the first section of Locke King's Act did not apply to the case before him, and it could not be said that the donee of the option was not entitled to have the incumbrances paid off out of the estate. It is said now that the Master of the Rolls stopped too soon in his reading of the section, and that he ought to have gone on to consider the words "but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged." It is contended that those are the words which are the operative part of the section dealing with the present case, that the son is a person "claiming through or under the deceased person," and that Stanley Villas are primarily liable to the payment of the mortgage. It may be that the son is a person claiming through or under the deceased person, but that is not enough. In my opinion the intention of the section is to put an obligation on the heir or devisee, and the sentence beginning with the words "but the land" which I have just read only gives an alternative to the proposition which has been negatived in the first part of the section. The first sentence is in the negative form. It provides that the heir or devisee shall not be entitled to have incumbrances discharged. It does not say what is to be the consequence of that negative provision, and the sentence beginning with "but the land" is introduced to supply that deficiency. It was not intended to import into the section any question of the relation between, or to throw a burden upon, other persons claiming through or under the deceased person, except so far as was necessary for giving effect to the negative part of the first sentence. Therefore, with great respect, I think the Master of the Rolls was right in his opinion that as the purchaser could not be treated as the heir or devisee the provisions of the Act did not apply to him. But, whether that is the true view or not, on the construction of this codicil I think the intention of the testator was to place the son in the same position as any outside purchaser would have occupied.

He made no other provision for him beyond a share of the residue, and he made it incumbent on the trustees, if the son expressed his desire to purchase the property, to sell it to him at a particular price. They are just as much acting under the trust for sale as in the case of any other purchaser. Therefore the son is entitled to have the property conveyed to him free from incumbrances.

Solicitors: *Busk, Mellor & Norris, for J. H. Cooke, Winsford; Coode, Kingdon & Cotton, for W. Clarke Deakin, Northwich.*

H. C. R.

LAMB *v.* SAMBAS RUBBER AND GUTTA PERCHA COMPANY, LIMITED.

[1908 L. 563.]

Company—Action to rescind Contract for Shares—Unpaid Calls—Notice to forfeit Shares—Interim Injunction restraining Forfeiture—Payment into Court—Practice.

Where in an action to rescind a contract to take shares the company have given notice to forfeit the shares for non-payment of calls, the Court will, on the plaintiff giving the usual undertaking in damages and paying into Court the amount of the call with interest, restrain the company from forfeiting the shares until the trial of the action.

Ripley v. *Paper Bottle Co.*, (1887) 57 L. J. (Ch.) 327, not followed.

MOTION.

In August, 1907, the plaintiff subscribed for 200 shares of 1*l.* each in the company and paid 10*s.* per share. In November a call of 5*s.* a share fell due, but he did not pay it. On February 27, 1908, the company in general meeting passed resolutions for a voluntary winding up. On March 3 the plaintiff received a notice from the company that, unless the call on his shares, with interest at the rate of 10 per cent. per annum from the date of the call, was paid by March 11, his shares would be liable to forfeiture pursuant to the articles of the company. On March 4 the plaintiff commenced this action claiming rescission of his contract to take the shares on the ground of misrepresentation in the prospectus, rectification of the register of shareholders by removing his name therefrom, and an injunction to restrain the

NEVILLE J. company from forfeiting his shares until the trial of the action, and obtained, ex parte an injunction extending over March 13. On March 5 the company issued notices convening a general meeting for March 13 to confirm the voluntary winding-up resolution. The plaintiff now moved for an injunction until the trial of the action.

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Jenkins, K.C., and *Cozens-Hardy*, for the motion. The plaintiff by his writ has elected to rescind, but if he fails at the trial he will require his shares. The order asked for has frequently been made in similar instances.

Peterson, K.C., and *A. McLean*, for the company. The motion is misconceived and must be dismissed with costs. *Ripley* v. *Paper Bottle Co.* (1) is directly in point.

[NEVILLE J. In that case the company apparently was a going concern. Here the company is in voluntary liquidation, or will be to-day. Is there any other authority?]

No; but it is submitted that the plaintiff ought to pay the amount of the call with interest to the company like the other shareholders. If he succeeds at the trial, he will then be a creditor of the company and have priority over the shareholders. The assets of the company are more than sufficient to pay its creditors in full. At any rate he ought to pay the amount into Court and give the usual undertaking in damages, and the costs of the motion ought to be the defendants' in any event.

Jenkins, K.C., in reply. *Ripley* v. *Paper Bottle Co.* (1) is not cited either in Buckley on Companies or Palmer's Company Precedents, and apparently has not been followed. It is submitted that it is not in accordance with the practice. In Palmer's Company Precedents, 9th ed. pt. i. p. 1241, there is a form of order for an interim injunction restraining the forfeiture of shares. The plaintiff is quite willing to give the usual undertaking and to pay the amount of the call and interest into Court without prejudice to his rights.

NEVILLE J. I will make the order. The plaintiff must give the usual undertaking in damages and pay the amount of the

(1) 57 L. J. (Ch.) 327.

call and interest into Court within seven days from to-day. If the money is not paid in, the injunction will drop. The costs of the motion will be costs in the action.

NEVILLE J. 1908 LAMB v. SAMBAS RUBBER AND GUTTA PERCHA COMPANY, LIMITED.

Solicitors: *Munns & Longden; Stephenson, Harwood & Co.*

H. L. F.

In re KLABER AND STEINBERG'S PATENT.

NEVILLE J. 1908 *Feb.* 14, 21; *March* 27.

Patent—Petition for Revocation—Motion to amend Specification—Comptroller—Advertisements—Terms—Costs—Practice—Patents and Designs Act, 1907 (7 *Edw.* 7, c. 29), *ss.* 22, 23, 92, *sub-s.* 2.

An application under s. 22 of the Patents and Designs Act, 1907, for leave to amend a specification does not fall within sub-s. 2 of s. 92 of the Act, and therefore does not require to be made to the patent judge.

Notice of an application under s. 22 of the Act must be given to the comptroller, and the proposed amendments must be advertised in the Official Journal, before the amendments are considered by the Court; and the comptroller will be entitled to his costs of appearing on the application.

When amendments are allowed it will, as a general rule, be a term of the order that no injunction shall be asked in any action brought for infringement of the patent in respect of articles made prior to the date of the order allowing the amendments, unless the patentee shall establish to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge.

In re Geipel's Patent, [1903] 2 Ch. 715, followed on this point.

MOTION.

In May, 1903, Klaber and Steinberg obtained letters patent for "improvements in and relating to hand stencilling or duplicating apparatus," and subsequently Steinberg assigned his interest in the patent to Klaber. In December, 1907, the Ellams Duplicator Company, who were manufacturers and venders of similar apparatus, presented a petition under the Patents Acts, 1883 to 1907, for revocation of Klaber's letters patent on the ground, inter alia, of prior publication. Thereupon Klaber applied to the Court under s. 22 of the Patents and Designs Act, 1907, for leave to amend his specification by deleting the first and second claiming clauses of his specification. On February 14 his application came before the Court, when

NEVILLE J. 1908 KLABER AND STEINBERG'S PATENT, *In re.*

it was agreed that the motion, being made in pending proceedings for the revocation of the patent, did not fall within sub-s. 2 of s. 92 of the Act, which required certain applications to be made to the patent judge. The Court, however, directed that the motion should stand over for a week and that notice of the application should be given to the comptroller in order that he might be heard thereon. On February 21 the motion came on again, when the Court ordered that the proposed amendments should be advertised in the Official Journal and that the application should meanwhile stand over.

The motion came on for hearing on March 27, 1908.

Lewis Edmunds, K.C., and *R. Frost*, for the motion. No one has appeared in answer to the advertisements to oppose the amendments, nor do the respondents oppose them. It is submitted that the amendments should be allowed and that it is only a question of the terms. Sects. 22 and 23 of the Act of 1907 are substantially to the same effect as ss. 19 and 20 of the Act of 1883. We ask that the old practice should be followed.

T. Terrell, K.C., and *C. Terrell*, for the company. The terms we ask are (1.) a fortnight to consider our position, (2.) that we may be at liberty to discontinue our petition, the patentee paying our costs of our petition and of this application, or (3.) that we may be at liberty to go on with our petition and to amend our particulars of objection.

Lewis Edmunds, K.C. We agree.

T. Terrell, K.C. We also ask that it be a term of the order that no action shall be brought for any infringement prior to the date of the order allowing the amendments, that is to-day, as in *Deeley* v. *Perkes*. (1)

Lewis Edmunds, K.C. There were special circumstances in that case. There are none here. We ask that the order should be in similar terms to that made in *In re Geipel's Patent*. (2) Of course, if an action for infringement is brought, it will be for the judge who tries the action to decide whether the original claim was framed in good faith and with reasonable skill and knowledge.

T. Terrell, K.C., in reply.

(1) [1896] A. C. 496. (2) [1903] 2 Ch. 715.

NEVILLE J. The statute (s. 23) does not say that no injunction shall be granted, but that no damages shall be given in any action in respect of the use of the invention before the disclaimer. I think, however, that there is no real difference, because the Court is not likely to grant an injunction where no damages are allowed. I will follow the decision of Buckley J. in *In re Geipel's Patent.* (1)

George Lawrence, for the comptroller, asked for his costs. The new rules under the Act of 1907 are settled, but are not yet published. Rule 3 directs that the comptroller is not to be entitled to his costs on applications to prolong patents under s. 18 of the Act. Rule 9 provides that the costs of and incident to all applications to the Court are to be in the discretion of the Court, except as expressly directed by r. 3.

Lewis Edmunds, K.C., opposed. There is no authority for such an order. The comptroller appears in the interests of the public and as an expert to advise the Court. Under the old practice he never asked for and was never ordered to pay costs. There is no case in which he has been given his costs.

NEVILLE J. I think you must pay the comptroller's costs of appearing on your application to amend. The new rules are not yet in force, but I think I ought to adopt them for the purposes of the Act, and I have no doubt of my jurisdiction to make the order.

Solicitors: *C. Urquhart Fisher; Pritchard, Englefield & Co.; Solicitor to the Board of Trade.*

(1) [1903] 2 Ch. 715.

H. L. F.

NEVILLE J.
1908
April 2.

In re BRUCE.
LAWFORD *v.* BRUCE.

[1907 B. 421.]

Administration—Statute-barred Debt owing to Estate—Residuary Legatee also Residuary Legatee of Debtor's Estate—Statute-barred Debt brought into Account.

A., entitled to a share in the residuary estate of a testator, was also the sole residuary legatee of a debtor to the testator's estate. No payment or acknowledgment on account of either principal or interest had been made for more than twenty years :—

Held, that A. must bring the debt and interest into account against his share in the testator's residuary estate.

The principle of *Courtenay* v. *Williams*, (1844) 3 Hare, 539; on appeal, (1846) 15 L. J. (Ch.) 204, applied.

Adjourned Summons.

The testator James Bruce died in 1882, having by his will devised and bequeathed his real estate and residuary personal estate to trustees upon trusts (in the events which happened) for his widow for life, and after her death upon trust for his seven children in equal shares. The defendant James Bruce was one of these children.

The testator's widow died in 1906. Some old papers of the testator's were then found from which it appeared that he had in 1878 lent his sister Emily Gordon 200*l.* at 5 per cent. interest, and that no payment or acknowledgment in respect of either principal or interest had been made since 1880.

Emily Gordon died in 1903, having by her will bequeathed the residue of her personal estate to the defendant James Bruce, and having appointed him and another her executors. Her will was proved by both her executors and her estate had been wound up, and the defendant James Bruce had received the residue of her personal estate, which amounted to about 5000*l.*

The plaintiffs were the present trustees of the will of the testator James Bruce, and had distributed and paid over his residuary estate other than the one-seventh share payable to

the defendant James Bruce, which amounted to about 1700*l.* The summons was taken out to determine whether or not the defendant James Bruce was bound to bring the 200*l.* with interest from 1880 into account against his one-seventh share of his father's residuary estate.

H. Warlters Horne, for the plaintiffs.

E. Beaumont, for the defendant James Bruce. Cross demands due in different rights cannot be set off or retained: *Bishop* v. *Church* (1); *Medlicot* v. *Bowes* (2); *Freeman* v. *Lomas* (3); *Middleton* v. *Pollock* (4); *Ex parte Morier*. (5) Here this 200*l.* is not a debt in the proper sense of the word due by the defendant to the testator's estate. It is a stale demand against Emily Gordon's estate, long statute-barred, of which the defendant knows nothing. It will be a great hardship if he has to pay the 200*l.* with interest since 1880.

J. M. Gover, for the other children of the testator. It is not a question of set-off or of retainer, but a question of equities. The debt and interest form part of the 5000*l.* which the defendant James Bruce has beneficially received as residuary legatee of Emily Gordon. He has, therefore, part of the testator's assets in his hands, and but for the Statute of Limitations the trustees of the testator's will could have followed the assets and could have sued him for the debt and interest: *Hunter* v. *Young*. (6) The principle of *Courtenay* v. *Williams* (7) and *In re Akerman* (8) applies. The trustees are entitled to say to him, "You have assets of the testator in your hands; pay your legacy pro tanto out of those assets," or, "You ask for a portion of the assets of the testator, but you yourself are a debtor to the testator's estate, and his assets are diminished pro tanto by your default; it is against conscience that you should take anything out of his estate until you have made good what you owe to it." *In re Akerman* (8) was approved of in *In re Wheeler*. (9)

E. Beaumont in reply.

(1) (1748) 3 Atk. 691.
(2) (1748) 1 Ves. Sen. 207.
(3) (1851) 9 Hare, 109.
(4) (1875) L. R. 20 Eq. 29, 34.
(5) (1879) 12 Ch. D. 491.
(6) (1879) 4 Ex. D. 256.
(7) 3 Hare, 539; on appeal, 15 L. J. (Ch.) 204.
(8) [1891] 3 Ch. 212.
(9) [1904] 2 Ch. 66.

NEVILLE J. 1908 BRUCE, *In re.* LAWFORD *v.* BRUCE.

NEVILLE J. I must say that this case seems, at first sight, a hard case because it is so very long since the debt was incurred and it is only recently that its existence has been discovered; but I cannot find any reason why the principle of *Courtenay* v. *Williams* (1) should not be applied to it. It is a case in which a beneficiary, who seeks payment of his share in the residuary estate of the testator, is an executor and the sole residuary legatee of his aunt who is a debtor to that estate, and it seems to me that the trustees of the testator's estate are entitled to say to him, "You have in your hands, as residuary legatee of your aunt, this debt which with interest has remained due from her and has never been paid to the testator's estate and ought to be accounted for." I think it is obvious that the Statute of Limitations does not apply to such a state of things; and, when once you get rid of the Statute of Limitations, there is nothing to prevent the trustees from saying, as was said in *Courtenay* v. *Williams* (1), "To the extent of the debt and interest in your hands you must pay yourself on account of your share in the residue of the testator's estate." I hold, therefore, that the 200*l.* must be brought into account with interest thereon at 5 per cent. from November, 1880.

Solicitors: *Pollock & Co.; Fladgate & Co.*

(1) 3 Hare, 539.

H. L. F.

HOPKINSON *v.* CHAMBERLAIN.

NEVILLE J.

1908

April 8.

[1907 H. 468.]

Vendor and Purchaser—Copyholds—Title—Conditional Surrender by way of Mortgage—Principal and Interest statute-barred—Conditions of Sale—Vacating conditional Surrender.

Copyholds were sold with a condition that "no evidence shall be required of the payment or discharge of any legacy or sum of money charged on the property which became payable twelve years or upwards prior to the day of sale." The court rolls contained an entry of a conditional surrender by way of mortgage made in 1865 by the predecessor in title of the vendors. The mortgagee had not been admitted, and no payment or acknowledgment in respect of either principal or interest had been made for more than twelve years prior to the day of sale:—

Held, that the condition precluded the purchaser from requiring the conditional surrender to be vacated by satisfaction being entered on the court rolls in the usual way.

ACTION.

By a contract dated March 9, 1905, the plaintiffs agreed to sell certain copyholds to the defendant at the price of 495*l.* The contract incorporated the general conditions of sale adopted by the Leicester Law Society. The sixth condition was as follows: "No evidence shall be required of the payment or discharge of any legacy or sum of money charged on the property which became payable twelve years or upwards prior to the day of sale, but a statutory declaration will be furnished at the expense of a purchaser who requires it that no payment or claim has been made in respect thereof during such twelve years." The plaintiffs were the trustees and executors of the will of one John Weet, who died in 1905. The abstract of title commenced with the admittance of John Weet in 1842. The defendant searched the court rolls and found that John Weet had in 1865 made a conditional surrender by way of mortgage to one Plummer to secure 150*l.* and interest, and this conditional surrender was not mentioned in the abstract of title. It then

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appeared that no payment or acknowledgment in respect of either principal or interest had been made on account of the mortgage for upwards of thirty years before the sale, that Plummer had died in 1869, and the copy conditional surrender was not amongst his papers, and it was believed to have been paid off and destroyed. The defendant required the conditional surrender to be vacated by satisfaction being entered on the court rolls in the usual way. The plaintiffs declined to comply with the requisition and relied on the sixth condition of sale and offered a statutory declaration in accordance therewith. The defendant insisting on his requisition, the plaintiffs commenced this action and claimed (1.) a declaration that they had shewn a good title in accordance with the conditions of sale, and (2.) specific performance of the contract. On July 2, 1907, the usual judgment was pronounced and an inquiry was directed whether a good title could be made to the copyholds. By his certificate, dated January 27, 1908, the Master certified that a good title could not be made to the copyholds. The action now came on for hearing on further consideration with a summons by the plaintiffs to vary the Master's certificate by certifying that a good title had been shewn. In the meantime the plaintiffs had on January 7, 1907, been admitted tenants to the copyholds, and their admission on the court rolls was subject to the conditional surrender of 1842 and the principal money and interest thereby secured.

Ashton Cross, for the plaintiffs, stated the facts.

St. J. Clerke, for the defendant. The sixth condition must be construed strictly. The purchaser is not asking for evidence of payment, and, unless he is bound, he is entitled to insist on the conditional surrender being vacated. The vendors have been admitted to the property subject to the surrender, and the surrender is a distinct blot on the title.

[NEVILLE J. The mortgagee's representatives cannot sue or foreclose. Then what is the effect of the entry on the court rolls? Is it necessary for the vendors to shew more than that nothing can be recovered under the conditional surrender?]

They ought to give the purchaser a clean slate. The principle

of *Sands* to *Thompson* (1) does not apply to copyholds. If the mortgagee's representatives now came to be admitted, the lord could not refuse them. The surrender is a cloud on the purchaser's title which ought to be cleared off, and according to the well-established practice of conveyancers he is entitled to have satisfaction entered on the court rolls: Davidson's Precedents, 4th ed., vol ii. pt. ii. pp. 278, 819.

NEVILLE J. In this case I think the objection insisted upon by the purchaser is not a good one. It appears that over thirty years ago there was a conditional surrender of these copyholds for the purpose of securing the sum of 150*l.* and interest. Now no claim has been made in respect of that mortgage for many years, and the title deeds relating to that claim are not forthcoming. They are not amongst the papers of the mortgagee. But there is no proof of the discharge of the debt, and the conditional surrender which appears upon the court rolls has not been vacated, and the question is whether the defendant, having purchased the property subject to the sixth condition of sale, is entitled to refuse to complete his purchase on the ground that there is a cloud on the title which appears upon the court rolls and which must be cleared off before he can be asked to take over the property. I have come to the conclusion that the contract he has entered into precludes him from insisting upon that objection. I think that there is no legal estate in the copyholds outstanding in the mortgage, but there is, no doubt, a notice of an equitable charge on the court rolls in favour of the mortgagee which came into existence over thirty years ago, and the purchaser has agreed by the sixth condition of sale that "no evidence shall be required of the payment or discharge of any legacy or sum of money charged on the property which became payable twelve years or upwards prior to the day of sale, but a statutory declaration will be furnished at the expense of a purchaser who requires it that no payment or claim has been made in respect thereof during such twelve years." It seems to me that, subject to the plaintiffs giving such a declaration, the purchaser is not entitled to insist on any further requisition with

(1) (1883) 22 Ch. D. 614.

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regard to this entry on the court rolls. It is, no doubt, notice of a charge in respect of which there is no proper evidence forthcoming that it has been paid off, but the purchaser has by the sixth condition committed himself to an admission that such payment has been made. I think, therefore, he is not entitled to insist upon the title being freed from notice that there was such a charge created in the year 1865. There will be a declaration that a good title was shewn before action.

Solicitors: *Gibson & Weldon, for Loseby & Son, Leicester; Field, Roscoe & Co., for H. B. Chamberlain, Mansfield.*

H. L. F.

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Feb. 19, 20.

DESCHAMPS *v.* MILLER.

[1906 D. 485.]

Jurisdiction—Foreign Property—Parties resident in England.

As a general rule an English Court will not adjudicate on questions relating to the title to or the right to the possession of immovable property out of the jurisdiction of that Court; and the exceptions to this rule depend on the existence between the parties to the suit in England of some personal obligation arising out of contract or implied contract, fiduciary relation, or fraud, or other conduct which in the view of an English Court of Equity would be unconscionable, and do not depend for their existence on the law of the locus of the immovable property.

In 1831 D. entered into a marriage contract with T. in France, both of them being domiciled French subjects. The plaintiff, the only son of this marriage, alleged that according to French law T. thereby became entitled to one half of the after-acquired property of D. and to a life interest in the other half of the property.

In 1836 D. went to India, and in 1839 went through a form of marriage with X., on whom and on others he by a settlement made in 1865 (of which the defendants were trustees) conferred interests in immovable property in Madras. D. died in 1885, and T. died in 1890. In 1893 an official in Madras (who was not a party to the English action mentioned below) took out letters of administration in India of the estate of T. which vested all her movable and immovable property in Madras in him. In 1907 the plaintiff took out letters of administration of the estate of T. in England. The plaintiff and the defendants being all in England, the plaintiff in an English action sought to impeach the

settlement of 1865 as being contrary to the law of France and in contravention of his rights thereunder :—

Held, that the action ought not to be entertained.

In re Hawthorne, (1883) 23 Ch. D. 743, followed.

On October 6, 1831, a contract of marriage in French form was made in France in consideration of the then contemplated marriage of Jean Deschamps and Marie Taris, who were both then domiciled and residing in France.

The agreement provided that the marriage should be governed by the *régime dotal* with community of acquired property under the French law.

The plaintiff, Thomas Deschamps, the son of the marriage, alleged that by the law of France his mother, Marie Taris, became entitled, by virtue of the contract and marriage, to one-half of the after-acquired property of Jean Deschamps (with some unimportant exceptions), and also to a life interest, on his death, in the other half of the property.

About the year 1836 Jean Deschamps went to India, and there, in 1839, in the lifetime of his wife, Marie Deschamps, he went through a form of marriage in Madras with Cecilia Taylor.

By an indenture dated February 14, 1865, Jean Deschamps, in consideration of his natural love and affection for his so-called "wife Cecilia Deschamps" and of a share in her father's estate which he had received, conveyed and assigned his business premises at Madras to a trustee, upon trust for Jean Deschamps for his life without impeachment of waste, and after his death upon trust to sell the same, and to hold the net proceeds of sale on trusts for the benefit of Cecilia Taylor and her children, if any, by Jean Deschamps, and in default of children for certain relations of Cecilia Taylor.

By deeds executed by him in 1866 and 1869 Jean Deschamps conveyed other real estate at Madras to be held upon the trusts of the settlement of 1865.

According to the plaintiff, all these properties were after-acquired property of Jean Deschamps settled without the knowledge of Marie Deschamps, and in breach of trust, and with intent to defraud her and deprive her of her rights in the property

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subject to the marriage contract of 1831; there was no good or valuable consideration for the settlement; by French law the husband could dispose of after-acquired property during the coverture, but only for "good consideration," which meant full consideration in money or money's worth.

Jean Deschamps died on December 14, 1885, and his wife died intestate in France on March 14, 1890, and the plaintiff claimed that by the law of France he was entitled to all her rights under the marriage contract of 1831.

On May 4, 1893, the acting Administrator-General of Madras took out letters of administration of Marie Deschamps' estate in the High Court of Judicature at Madras, and by the law of British India all her movable and immovable property in Madras vested in the Administrator-General for the time being of Madras.

Cecilia Taylor had no children by Jean Deschamps and she died in 1905.

The plaintiff on March 30, 1906, brought the present action against the trustees of the settlement of 1865, claiming (1.) a declaration that the several properties comprised in that deed and the deeds of 1866 and 1869 were after-acquired property of Jean Deschamps within the meaning of the marriage contract of 1831, that Jean Deschamps was a trustee of his wife's interest therein, and that the plaintiff, as administrator of Marie Deschamps, was entitled to one equal moiety thereof or of so much thereof as was then subject to the trusts of the settlement of 1865, and the income thereof, and to the other moiety of the income thereof as from the death of Jean Deschamps until the death of Marie Deschamps, or, in the alternative, that the plaintiff was entitled to the whole of the properties and the income thereof as from the death of Jean Deschamps; (2.) a declaration that the deeds of 1865, 1866, and 1869 were fraudulent and void as against the plaintiff, or, alternatively, rectification of the same and the trusts thereof in accordance with the provisions of the marriage contract of 1831; (3.) an inquiry as to the nature, extent, and value of the properties, and as to the disposal of the same and the proceeds thereof as from the date when the defendants became trustees; (4.) an account of the defendants' dealings with the properties as from the death of Jean Deschamps, or, alternatively, as from

the death of Cecilia Taylor; (5.) payment of all sums found upon taking the accounts to have been received by the defendants to which the plaintiff was entitled under the marriage contract; (6.) reconveyance and transfer to the plaintiff of one moiety, or, alternatively, the whole of the properties; (7.) an injunction to restrain the defendants from parting with the properties otherwise than as claimed, or, alternatively, from parting with more than a moiety thereof.

The defendants by their defence alleged that the settlement of 1865 was made for good and valuable consideration and that the other deeds attacked were merely ancillary to the settlement and executed in pursuance of it; that the sum stated in the settlement as the consideration for it was money which Jean Deschamps had received for the use of Cecilia Taylor; that the business premises conveyed by the settlement were property to which Jean Deschamps became entitled under the will of Cecilia Taylor's father; and that the settlement was not fraudulent against the marriage contract or otherwise. The defendants also alleged by their defence that they did not admit that when they were appointed trustees they knew, or that it was the fact, that the settlement and the other deeds attacked were executed for the purpose of defrauding Marie Deschamps; that the property which was the subject of the plaintiff's claim was immovable property situate in the Presidency of Madras; that by the law of British India all movable and immovable property in that country belonging to any European vested in his or her executor or administrator, who was the only person entitled to sue in respect of the property; and that the property of Marie Deschamps in Madras was vested in the Administrator-General for the time being of Madras; and that the action was not properly constituted in the absence of the persons who, with the defendants, were beneficially interested under the settlement. Amongst other defences the defendants set up acquiescence and laches on the part of the plaintiff, and that he was statute-barred by the law of British India.

The plaintiff and the defendants were all within the jurisdiction of the English High Court of Justice, and in January, 1907, the plaintiff took out English letters of administration of the personal estate of Marie Deschamps.

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Buckmaster, K.C., and *Israel Davis*, for the plaintiff.

Romer, K.C., and *W. R. Sheldon*, for the defendants. There is a preliminary objection—that the Court has no jurisdiction. There being no privity between the parties to the action, the plaintiff cannot in this country assert a right to lands out of the jurisdiction: *Norris* v. *Chambres* (1); *Norton* v. *Florence Land and Public Works Co.* (2) Subject to certain exceptions, "the Court has no jurisdiction to entertain an action for the determination of the title to, or the right to the possession of any immovable situate out of England (foreign land)" except in respect of obligations arising from a person's own contract or tort, or under a trust: Dicey on the Conflict of Laws, pp. 214, 217, 218. And see Westlake's Private International Law, 4th ed. s. 172. There is nothing in the authorities to shew that the rule is confined to legal rights and does not apply to equitable claims. In a case of contract or fraud the Court will assert jurisdiction if it can do so effectually: *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan and Agency Co.* (3) For instance, a foreclosure judgment, being a personal remedy, may be made against a defendant here in respect of land outside the jurisdiction: *Paget* v. *Ede*. (4) Possibly the Court could have ordered Jean Deschamps, if alive, to perform the marriage contract, but that contract cannot be enforced by an order to convey against the Indian land, or against the defendants as the possessors of it. There is also the objection that the intestate's estate is vested in the Administrator-General of Madras.

Buckmaster, K.C., and *Israel Davis*. The authorities relied on by the defendants relate to liens and similar rights as to foreign lands. The present action is brought in respect of the French marriage contract and the disposition made of the property subject to it by the plaintiff's father contrary to the law of France. The Indian law of immovables is not a matter which the Court is asked to determine; it is only asked to decide whether there was good consideration for the conveyance, and, if there was, to make a declaration that the plaintiff's father has

(1) (1861) 29 Beav. 246; affirmed 3 D. F. & J. 583.
(2) (1877) 7 Ch. D. 332, 336.
(3) [1892] 2 Ch. 303.
(4) (1874) L. R. 18 Eq. 118.

not made a valid disposition of the property. As the parties are here and the action is in respect of a contract, the Court has jurisdiction: *Penn* v. *Lord Baltimore* (1); *Lord Cranstown* v. *Johnston* (2); *British South Africa Co.* v. *Companhia de Moçambique* (3); *Duder* v. *Amsterdamsch Trustees Kantoor.* (4) It is sufficient that there was privity between the plaintiff's father and the defendants: *Norris* v. *Chambres.* (5) If the Court made a declaration in the plaintiff's favour, he might have to take further proceedings in India, but that fact ought not to disentitle him to what he now claims. So far, at any rate, as regards proceeds of sale in the defendants' possession, the plaintiff is entitled to sue in this country. If necessary, the Court may order the beneficiaries under the settlement to be added as defendants. The plaintiff's grant of administration entitles him to sue here.

Romer, K.C., in reply. To enable the plaintiff to sue, he must have some equity as in *Lord Cranstown* v. *Johnston.* (2) There is nothing in *Duder* v. *Amsterdamsch Trustees Kantoor* (4) which is against the defendants.

Parker J. In this action the plaintiff sues as administrator of his mother, who died on March 14, 1890, and he asks for a declaration of his title as such administrator, under a contract made on the marriage of his mother with his father, Jean Deschamps, in the year 1831, the contract being made in France, to various interests in certain real estate in India of which the defendants are in possession as trustees of a settlement made by the father on February 14, 1865, under which settlement the plaintiff himself is in no way interested. He asks also for various consequential relief founded on the declaration. Certain preliminary objections are taken by the defendants to the plaintiff's right to maintain this action, and I am asked to give my decision on those objections without going into evidence on what I may call the merits of the case. Both parties are agreed that this course will be a convenient one and likely to save expense, although, of course, if I dismiss the action on a preliminary point,

(1) (1750) 1 Ves. Sen. 444, 454.
(2) (1796) 3 Ves. 170, 172.
(3) [1893] A. C. 602, 626.
(4) [1902] 2 Ch. 132.
(5) 29 Beav. 246; affirmed 3 D. F. & J. 583.

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and my decision is reversed on appeal, the action will have to be sent down again for trial on the merits.

The first of these preliminary points, and indeed the one which has most substance in it, is as follows: It is said that the action relates to the title and possession of real estate out of the jurisdiction of the Court, and therefore that it ought not to be entertained by the Court, even though all parties to the action are resident within the jurisdiction. In order to deal with this point I must, I think, consider somewhat more closely the nature of the right which the plaintiff is asserting in the action. The first step in his case is the marriage contract of 1831, made, as I have said before, in France, and its meaning and effect according to the French law. It is alleged that according to such meaning and effect Marie Deschamps, the wife, became entitled to a moiety of all after-acquired property of her husband, with, perhaps, certain exceptions not material for the present case, and, consequently, to a moiety of the lands in India which are in question in the action; and, further, that she also became entitled, as I understand the contention, to a life interest after her husband's death in the remaining moiety of such lands. It is admitted that during the coverture the husband was, according to French law, administrator of and had a disposing power over all such lands, subject, however, to this, that he could not dispose of the same otherwise than for "good consideration" according to the meaning of that expression in French law. (1) But it is alleged that the conveyances of the husband under which the defendants claim title were not made for good consideration according to French law, and that consequently, according to the same law, the wife could follow the property and claim it in the defendants' hands. It is obvious, however, that whether or not the wife could assert any interest against land outside France would be governed entirely by the law of the place where the land is situate. If, for example, the land were in England, it

(1) The Court must not, of course, be taken as giving any opinion as to the correctness of this version of the French law. There is no term in French law properly translated by "consideration"; certainly not *cause*, which may be the French word intended: but the usual term is *à titre onéreux*, see Planiol, Traité élémentaire de droit civil, 2nd ed. 1903, iii. 321, 322.—F.P.

would not be enough to prove that according to French law the wife had an interest. In order to assert such interest against the defendants it would have to be made out either that the defendants were not purchasers for value, or that, though they were purchasers for value, they had notice of the wife's interest under the French contract. Of course a purchase for value under the English law may have a totally different meaning from a purchase for good consideration according to the French law; and I am told in the present case that in France good consideration for such a purpose as this means full consideration in money or money's worth. In order, therefore, to decide whether the plaintiff can succeed in following the property into the hands of the defendants I should have to consider the law relating to immovable property in India. Not only may that law differ from the law of England in the extent to which equitable interests are recognized, but also in the importance which attaches to the presence or absence of notice. It may also contain provisions such as the statutes for the limitation of actions or suits, or for the registration of titles, which would materially affect the matter I have to decide.

The question is whether under these circumstances the Court ought to entertain jurisdiction. In my opinion the general rule is that the Court will not adjudicate on questions relating to the title to or the right to the possession of immovable property out of the jurisdiction. There are, no doubt, exceptions to the rule, but, without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend on the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a Court of Equity in this country, would be unconscionable, and do not depend for their existence on the law of the locus of the immovable property. Thus, in cases of trusts, specific performance of contracts, foreclosure, or redemption of mortgages, or in the case of land obtained by the defendant by fraud, or other such unconscionable conduct as I have referred to, the Court may very well assume jurisdiction. But where there is no contract, no fiduciary relationship, and no fraud or other unconscionable conduct giving rise to a personal obligation

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between the parties, and the whole question is whether or not according to the law of the locus the claim of title set up by one party, whether a legal or equitable claim in the sense of those words as used in English law, would be preferred to the claim of another party, I do not think the Court ought to entertain jurisdiction to decide the matter.

In the present case there is, in my opinion, no such personal obligation as above mentioned, and I do not think I could assume jurisdiction in this case without acting contrary to the decision in *Norris* v. *Chambres*. (1) In that case there was a contract for sale of immovables abroad, and a deposit was paid. The vendor refused to complete, and the purchaser claimed a lien for the deposit on the property agreed to be sold; but he claimed that lien, not as against the vendor with whom he had contracted, but against a third party who had purchased subsequently with notice of the prior contract and of the claim to the lien for the deposit. There was no personal obligation based on contract, fiduciary relationship, fraud, or other unconscionable conduct between the parties, and the right, if there was a right, to succeed in the action depended, therefore, solely on whether the law of the locus of the immovable property would recognize any lien as arising out of the contract for sale coupled with the payment of a deposit, and, if so, what was the position, with regard to such lien, of a purchaser with notice. The Court refused to entertain the action. In a similar way here, the question depends on whether the Indian law will recognize the French contract as having created an interest in the wife, and, if so, what is the position with regard to such interest of the defendants, who in their pleadings claim to have purchased for value without notice. There is no obligation on the part of the defendants to the plaintiff based on any contract, fiduciary relationship, fraud, or other unconscionable conduct. Such obligation, if any, as exists depends, in my opinion, on the Indian law relating to immovables, and on that alone. It was suggested that the defendants have since action, or shortly before action, sold some of the property in dispute, and that this at any rate gives the Court jurisdiction. I do not think, however, that I could so decide

(1) 29 Beav. 246; affirmed 3 D. F. & J. 583.

without acting contrary to the decision of Kay J. in *In re Hawthorne*. (1) In my opinion, therefore, the preliminary objection which I have been discussing succeeds.

The second objection is that the plaintiff's title depends on an English grant of letters of administration of his mother's estate, it being admitted that there is an administrator in India in whom, according to Indian law, all the real and personal estate situated in India of the mother is vested. In my opinion this objection also is fatal to the plaintiff's right to sue, at any rate without making such administrator a defendant and proving that the circumstances are such that the cestui que trust can enforce an equitable right which is vested in his trustee. If I decided in favour of the plaintiff on the first objection I might have to dispose of an application for leave to amend the pleadings so as to obviate the second objection. But, the second objection having been taken in the pleadings and being in no way a surprise to the plaintiff, I doubt whether I should exercise my discretion in that respect, at any rate without imposing as a term or condition that the plaintiff should pay the costs hitherto incurred. Also, difficulties might have arisen on the question whether on the true construction of the Rules and Orders of the Supreme Court leave could in such a case have been obtained to serve the real administrator with a writ of summons out of the jurisdiction. I have not, however, having regard to my decision on the first point, to consider the question of the construction of the rules in this respect.

In my judgment, having regard to what I have said on these preliminary points, the action fails, and the judgment should state that "the Court, being of opinion that it ought not to entertain jurisdiction in the action having regard to the property being in India and to the fact that the plaintiff has no right to sue in the absence of the real administrator in India, dismiss the action with costs."

Solicitors for plaintiff: *Rubinstein, Myers & Co.*
Solicitors for defendants: *Sanderson, Adkin, Lee & Eddis.*

(1) 23 Ch. D. 743.

F. E.

PARKER J.

1908

March 12, 13, 16.

CROSBIE-HILL *v.* SAYER.

[1907 C. 2161.]

Mortgage—Building Society—Statutory Receipt—Successive Incumbrancers—Priority—Right to call for Legal Estate—Equitable Charge with Undertaking to give Legal Mortgage—Equitable Transferees—Merger—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 42.

In 1902 D., a solicitor, gave a mortgage in fee simple of certain property to a building society to secure 1650*l.* In June, 1905, D. arranged with a bank to pay off the mortgage, and on June 23, 1905, the society's solicitors wrote that the society would indorse the statutory receipt when the money was paid, and that the bank would pay the money to the society's account, and would take all the deeds except the society's mortgage. On June 26, 1905, the bank paid the money to D.'s account; D. immediately drew a cheque for the amount which was credited to the society; the society handed to the bank's solicitors all the deeds (except the mortgage) and an undertaking to indorse the statutory receipt; and D. gave the bank an equitable charge on the property comprised in the deed, including the mortgage (described as being already indorsed with the statutory receipt) to secure 1600*l.*, the charge containing an undertaking to execute a legal mortgage if and when required. Shortly afterwards the society handed the mortgage, with the statutory receipt indorsed on it, to the bank's solicitors:—

Held, that the undertaking to give a legal mortgage did not amount to a contract that the legal estate should vest in D., and that the effect of the statutory receipt was to vest the legal estate in the bank.

In November, 1905, D., by shewing L. what purported to be a conveyance of the same property to D., but which was a forgery, induced L. to lend him 850*l.*, and gave L. (who had no notice of the bank's mortgage) what purported to be a mortgage in fee of the same property to secure that amount.

In December, 1906, D. arranged that the plaintiffs should pay off the bank, and they did so, receiving the deeds and the bank's security (indorsed with a statement that all claims thereunder had been satisfied), and D. gave the plaintiffs (who had no notice of L.'s mortgage) what purported to be a legal mortgage for the amount paid:—

Held, that the plaintiffs' mortgage had priority over that of L.

In this case, by an indenture dated June 16, 1902, Watson Dyer, a solicitor, conveyed a property known as "Swale," situate at Hutton Mount, Hutton, in the county of Essex, to the Nineteenth Century Building Society by way of legal mortgage in fee

simple to secure the sum of 1650*l.* and interest payable by instalments. In the month of June, 1905, Watson Dyer, the mortgagor, arranged with his bankers, the Union of London and Smith's Bank, to pay off this mortgage. Some correspondence ensued as to the precise mode in which the money was to be paid off by the bank, and on June 23, 1905, the solicitors for the society wrote saying that the usual procedure of all building societies was for an undertaking to be given to indorse the statutory receipt upon the mortgage when the money was paid off, and that the bank would pay the redemption money directly to the society's account at another branch of the same bank, and of course would take all the deeds, with the exception of the mortgage deed, so that they ran no possible risk. Accordingly, on June 26, 1905, a representative of the bank paid the sum of 1600*l.*, which as a matter of procedure was credited to the account of Watson Dyer, and he immediately drew a cheque thereupon for 1595*l.* 19*s.* 6*d.*, being the amount due to the society. That sum was credited to the society's account at the other branch of the same bank. At the same interview the society handed over all the deeds to the solicitors for the bank with the exception of the actual mortgage deed, which the society retained, giving at the same time a written undertaking to indorse thereupon, and have signed by the proper parties, the statutory receipt. At the same time Watson Dyer gave to the bank a memorandum of equitable charge whereby he charged the property comprised in the deposited deeds which were specified in the schedule, and which included the prior deeds and also the mortgage with the statutory receipt said to be indorsed thereupon (but which was not then indorsed thereupon), to secure 1595*l.* 19*s.* 6*d.*, the money which had been paid at the time of the transaction, and any further advances. The memorandum contained the usual undertaking to execute a legal mortgage if and when required.

Some short time after the above-mentioned transaction the society caused the usual statutory receipt to be indorsed upon the mortgage and signed, and they handed over the mortgage with that indorsed receipt to the solicitors for the bank. The solicitors thereupon returned the undertaking relating to the

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statutory receipt to the secretary of the society, who caused the same to be destroyed in accordance with the usual practice.

All the title deeds relating to the property, and also the memorandum of charge, thenceforth remained in the possession of the bank.

The receipt indorsed was in accordance with s. 42 of the Building Societies Act, 1874. (1)

In November, 1905, Dyer asked William Henry Laurie, for whom he had for some years previously acted as solicitor, to lend him money on the security of the same property. He suppressed the fact of the property being already in mortgage, and in support of his title shewed Laurie what purported to be a conveyance of the property, dated March 23, 1900, from George Sherrin to Dyer, and other documents purporting to shew Sherrin's title. The conveyance was forged by Dyer for the purpose of obtaining the advance, and Laurie lent 850*l.*, and Dyer by an indenture dated November 6, 1905, purported to convey the property to Laurie to secure the 850*l.* and interest. The documents shewn to Laurie were handed over to him.

At the date of the mortgage to Laurie 1600*l.* was due to the bank on its security, and the same sum still remained due on December 12, 1906. Shortly prior to December 12, 1906, the plaintiffs Crosbie-Hill, Edwards, and Ford (who had no knowledge or notice of Laurie's mortgage) agreed to lend Dyer 1500*l.* on the security of a first mortgage of the same property, it being at the same time arranged that this sum of 1500*l.* and another sum of 100*l.* (mentioned below) should be paid to the bank in discharge of its mortgage debt. Accordingly the solicitor of the

(1) 37 & 38 Vict. c. 42, s. 42: "When all moneys intended to be secured by any mortgage or further charge given to a society under this Act in England or Ireland have been fully paid or discharged, the society may endorse upon or annex to such mortgage or further charge a reconveyance of the mortgaged property to the then owner of the equity of redemption, or to such persons and to such uses as he may direct, or a receipt under the seal of the society, countersigned by the secretary or manager, in the form specified in the schedule to this Act, and such receipt shall vacate the mortgage or further charge or debt, and vest the estate of and in the property therein comprised in the person for the time being entitled to the equity of redemption, without any re-conveyance or re-surrender whatever. . . . ."

proposed mortgagees attended with Dyer at the bank on December 12, 1906, and paid the bank 1600*l.* in discharge of its mortgage debt, the bank at the same time handing to him the title deeds of the property and the memorandum of charge of June 26, 1905, with a memorandum indorsed thereon stating that all claims thereunder had been discharged. At the same time and place Dyer executed in favour of Crosbie-Hill, Edwards, and Ford what purported to be a legal mortgage in fee simple to secure 1500*l.*, and in favour of the plaintiff Rushbrooke (who had no knowledge or notice of Laurie's mortgage) what purported to be a second mortgage to secure 100*l.* The bank did not join in these mortgages. The title deeds and memorandum of charge were handed to Crosbie-Hill, Edwards, and Ford, but the bank did not make any conveyance to them. Laurie died in January, 1907.

Dyer subsequently agreed to sell the equity of redemption to a man called Rydon.

The present action was commenced on July 11, 1907, by Crosbie-Hill, Edwards, Ford, and Rushbrooke against Laurie's executors and Rydon and Dyer for a declaration that the mortgage of the first three plaintiffs was entitled to rank as a first mortgage and the mortgage of Rushbrooke was entitled to rank as a second mortgage on the property, and that both mortgages had priority over the mortgage to Laurie, and that in any case the plaintiffs had priority as transferees of the mortgages to the society and the bank. The plaintiffs also asked for enforcement of their securities by foreclosure or sale, and as against Dyer for payment of the principal sums and interest secured by the plaintiffs' mortgages. Laurie's executors pleaded that by the mortgage to Laurie he had acquired a legal first mortgage without notice of any defect in the title to or any incumbrance on the property, and without any negligence in failing to discover the existence of the mortgages to the bank or the plaintiffs; and that, if Laurie did not obtain the legal estate, his equity was prior in time to that of the plaintiffs; and they counterclaimed for a declaration that Laurie's mortgage had priority, and for the enforcement of the mortgage by foreclosure or sale.

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The action was not defended by Rydon or Dyer.

The action was tried by Parker J. on March 12 and 13, 1908.

Buckmaster, *K.C.*, and *Gatey*, for the plaintiffs. The bank, having paid off the society's mortgage and taken over the title deeds, was best entitled to the legal estate. The plaintiffs are entitled to stand in the shoes of the bank. The fact that Dyer gave Laurie what purported to be a legal mortgage does not affect the question, for the legal estate was not then in Dyer. The bank still holds the legal estate, and holds it as part of the security the benefit of which was transferred to the plaintiffs.

On s. 5 of the Act 6 & 7 Will. 4, c. 32, for which s. 42 of the Building Societies Act, 1874, was substituted, Lord Cairns L.C. held that, on the statutory receipt being indorsed and the title deeds being handed over to persons who paid off the building society's mortgage and who had no notice of a subsequent equitable charge, the legal estate vested either in the original mortgagor or in the persons who had the best right to call for it: *Pease* v. *Jackson*. (1) In that case the mortgagor executed a fresh mortgage to the person who paid off the building society, so that on either construction they took the legal estate. It is submitted that the true effect of s. 42 is that the legal estate vests in the person who has the best right to call for it, in this case the bank. In *Hosking* v. *Smith* (2) the House of Lords adopted the construction that the legal estate vests in the person having the best right to call for it, and rejected, as Lord Cairns did, the argument that it was necessarily vested in the next equitable incumbrancer in point of time. *Hosking* v. *Smith* (2) did not overrule the decision on the main point of the case before Lord Cairns, but only his decision as to the right to tack a small sum, a question which seems not to have been argued.

Where, before a building society's mortgage on four houses was paid off, the mortgagor sold one house and conveyed it to the purchaser, who had no notice of the mortgage, and then another person at the request of the mortgagor paid off the mortgage and took the title deeds, including the mortgage with

(1) (1868) L. R. 3 Ch. 576. (2) (1888) 13 App. Cas. 582.

the statutory receipt indorsed, Kay J., considering himself bound by previous decisions, held that the effect of the receipt was to vest the legal estate in the new mortgagee and to give him priority over the purchaser: *Sangster* v. *Cochrane*. (1) There is nothing in the decisions of Jessel M.R. in *Fourth City Mutual Benefit Building Society* v. *Williams* and *Marson* v. *Cox* (2) conflicting with the contention that a person paying off a building society's mortgage, and having no notice of a puisne mortgage, obtains the legal estate by means of the statutory receipt.

Dyer's undertaking to execute a legal mortgage to the bank does not intercept the legal estate so as to vest it in Dyer. The undertaking was only intended to apply in case the legal estate was outstanding in Dyer. It never was so outstanding, but was vested in the bank by means of the statutory receipt. The bank's title was unaffected by the mortgage to Laurie, and the plaintiffs are in the position of transferees from the bank.

Romer, *K.C.*, and *Edward Beaumont*, for Laurie's executors. The plaintiffs say that when the society was paid off the legal estate vested in the bank. If it vested in Dyer, he passed it on to Laurie. If it vested in the bank, it is there still and not in the plaintiffs. But they say that they are entitled to stand in the bank's shoes, and that, although second in point of time, they are prior in point of charge. If they are entitled to stand in the shoes of the bank, it is immaterial whether the legal estate is in the bank. Sect. 42 of the Act of 1874 says that the society may either reconvey the property or indorse the statutory receipt. If the society had reconveyed, to whom would it have had to reconvey? The section says the reconveyance must be "to the then owner of the equity of redemption." In *Fourth City Mutual Benefit Building Society* v. *Williams* (3) Jessel M.R. points out who may be the owners of it. The Court ought to assume the part of a conveyancer and see who is entitled to the reconveyance. If the property had been settled, the society would have had to reconvey to the trustees of the settlement. If the mortgagor, instead of being Dyer, had been a limited

(1) (1884) 28 Ch. D. 298. (2) (1879) 14 Ch. D. 140.
(3) 14 Ch. D. 145.

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company, and the person finding the money had held a debenture giving a floating charge, would the debenture-holder have been entitled to a conveyance of the legal estate? The answer to the question who is entitled to the legal estate does not depend on the question who pays off the money. Jessel M.R. in the case just cited uses no roundabout language. He says: "Now let us see who it is to whom they ought to convey, by law as the owner of the equity of redemption. By law, clearly, if there were several successive mortgages, each one framed as a conveyance, with a proviso for redemption, the owner of the equity of redemption to whom the society ought to convey, is that one of the several owners who is entitled to call for the conveyance; that is to say, where the ownership is split up the conveyance must be to the man entitled to call for it. . . . . Where the ownership is split up by successive mortgages, the mortgagee of the equity of redemption is the real owner of the equity of redemption, subject to redemption." The words "framed as a conveyance" are important. The bank's charge was not so framed. It was framed in the way usual with banks when they make temporary advances. The undertaking to execute a legal mortgage rebuts any inference that the bank was to have the legal estate, and if there had been a reconveyance it would have been to Dyer and not to the bank. The bank made no difference in its form of security because the original mortgagee was a building society. Suppose the property had been leasehold, under a lease at a rack rent, would the statutory receipt have made the bank liable to the rent and lessee's covenants?

[PARKER J. The man who has the better equity has the right to call for the legal estate. Could the society have reconveyed to Dyer knowing as it did of the mortgage to the bank?]

It could have said that it would only reconvey to him subject to the equitable charge in favour of the bank. The bank, by the form of its security, shewed that it wished the legal estate to be in Dyer, and it obtained a larger remedy by obtaining the undertaking to give a legal mortgage. The bargain really was that the legal estate should be in Dyer. There is no general doctrine of equity that a man who pays off a mortgage is entitled to the legal estate, or to stand in the shoes of the mortgagee; otherwise

cases like *Phillips* v. *Gutteridge* (1) and *Irby* v. *Irby* (*No.* 3) (2) would have been unarguable. The question whether a charge is to be merged or kept alive is one of intention: Coote on Mortgages, 7th ed. p. 1461.

[PARKER J. referred to *Liquidation Estates Purchase Co.* v. *Willoughby* (3), *Thorne* v. *Cann* (4), and *Toulmin* v. *Steere.* (5)]

If the intention to keep the security alive is shewn, the security is not extinguished: *Adams* v. *Angell.* (6) It depends on whether it was for the benefit of the person paying off the charge that it should be kept alive. There is nothing here to shew that it was for the bank's benefit to keep the charge alive when the bank paid it off.

[They also referred to Coote on Mortgages, 7th ed. p. 582; *Taylor* v. *Russell.* (7)]

Buckmaster, K.C., in reply. When the statutory receipt is indorsed the legal estate passes from the building society, but not necessarily to the person who expresses the wish to have it. It passes to the person who has the best right to call for it. The money found by the bank did not go through Dyer's hands. In equity the bank, on paying off Dyer's debt to the society, became the transferee of the security: *Cracknall* v. *Janson.* (8)

Cur. adv. vult.

March 16. PARKER J., after stating the facts down to and including the destruction of the undertaking, continued as follows:—The first question I have to decide in this case is whether the statutory receipt operated to vest the legal estate in Watson Dyer, the mortgagor, or in the bank, which paid off the first mortgage. This, of course, depends upon the true construction of s. 42 of the Building Societies Act, 1874. The construction of this section and of the corresponding section of 6 & 7 Will. 4, c. 32, has been determined by the House of Lords in the case of *Hosking* v. *Smith* (9), and it must now be taken as law that the effect of the statutory receipt is to vest the legal

(1) (1859) 4 De G. & J. 531.
(2) (1858) 25 Beav. 632.
(3) [1896] 1 Ch. 726; [1898] A. C. 321.
(4) [1895] A. C. 11.
(5) (1817) 3 Mer. 210.
(6) (1877) 5 Ch. D. 634.
(7) [1892] A. C. 244.
(8) (1879) 11 Ch. D. 1, 18.
(9) 13 App. Cas. 582.

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estate in the person having the best right to call for a conveyance thereof. The only persons in the present case who could possibly have a right to call for a conveyance of the legal estate were Watson Dyer, the mortgagor, and the bank. If there had been any question, at the date when the receipt was indorsed, who had the better right, such question, in my opinion, must have been determined in favour of the bank, if only because of the contract for a legal mortgage contained in the memorandum of equitable charge. Does it make any difference that the receipt, though executed after the date when the money due on the first mortgage was paid off, was by arrangement dated of the same date? I am of opinion that it does not. Had it been executed on the day on which the money was paid off and been handed over to the bank with the other documents against payment by the bank of the society's mortgage, I still think its effect would have been to vest the legal estate in the bank, unless possibly the bargain between Dyer and the bank precluded the latter from asking for the legal estate on completion of the transaction. I see no evidence of any such bargain. All the circumstances are, in my opinion, consistent with the parties having contemplated that the bank would get the legal estate. It is true that Dyer contracts to give a legal mortgage when called upon, but such a mortgage might be useful as containing a power of sale and a covenant for payment, even if it were unnecessary for the purpose of passing the legal estate. I cannot construe this provision as a contract that the legal estate is to be and remain vested in Dyer until the bank shall call for a transfer thereof, nor do I think I ought to speculate on what would have been the answer of the bank had it been asked whether, when it paid the money, it desired the legal estate to be vested in it by virtue of the statutory receipt which it proposed to have executed. In my opinion, the third party, who at the request of the mortgagor pays off a mortgage, has prima facie a better right than the mortgagor to call for a conveyance, and the mere fact that as part of the same transaction the mortgagor executes in favour of the third party a memorandum of equitable charge containing an agreement to give a legal mortgage, when called upon so to do, does not abrogate this prima facie right.

I hold, therefore, that the statutory receipt operated to vest the legal estate in the bank.

On November 6, 1905, Dyer purported to convey the property to William Henry Laurie by way of mortgage in fee simple to secure an advance of 850*l*. This transaction was a gross fraud. Laurie was not informed of the bank's security and was induced to accept the mortgagor's title on the strength of a conveyance which Dyer forged for the purpose, the real title deeds being with the bank. It is admitted that if Dyer had had the legal estate, it would have passed to Laurie by this mortgage, and that he could have relied on it as against all equitable incumbrances of which he had no notice; but I have already held that the legal estate was not in Dyer, but in the bank, so that Laurie took an equitable estate only. The first two defendants are Laurie's legal personal representatives, and the benefit of such equitable mortgage as was created by the indenture of November 6, 1905, is now vested in them.

[His Lordship stated the further facts down to and including the execution of the mortgages to the plaintiffs, and continued :—] The bank did not join in these mortgages, and the legal estate remained and still remains outstanding in the bank. The mortgages to the plaintiffs and the mortgage to the first two defendants are thus all of them equitable mortgages only, and the question I have to decide is whether the plaintiffs or these two defendants have the better equity. In my opinion the plaintiffs have the better equity. It seems to me that on the authority of *Pease* v. *Jackson* (1), *Fourth City Mutual Benefit Building Society* v. *Williams* (2), *Sangster* v. *Cochrane* (3), and *Hosking* v. *Smith* (4), the plaintiffs have a better right to call for the legal estate than the first two defendants. In *Pease* v. *Jackson* (1) there was a first mortgage, which passed the legal estate, and a second equitable mortgage. The defendants in that case paid off the first legal mortgage at the request of the mortgagor, who at the same time conveyed the property to them by way of security for the amount paid and a further sum. The defendants in that case obtained the title deeds from the first mortgagee. They

(1) L. R. 3 Ch. 576.
(2) 14 Ch. D. 140.
(3) 28 Ch. D. 298.
(4) 13 App. Cas. 582.

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had no notice of the second mortgage. Apart from any question of the legal estate, their equity was held to be better than the equity of the second mortgagee. I cannot find any material difference between the facts of that case and the facts of the present case, except that in *Pease* v. *Jackson* (1) the second mortgagees had taken their security with notice of the outstanding legal mortgage, and from the other cases I have referred to it appears that this fact is not really material.

In *Fourth City Mutual Benefit Building Society* v. *Williams* (2) there were a first legal mortgage, and a second mortgage which purported to be a legal mortgage, the second mortgagee, as in the present case, having no notice of the first mortgage and being induced to accept the title by a forged deed. Then a third party, at the mortgagor's request, paid off the first mortgage without notice of the second mortgage and obtained the deeds, the mortgagor at the same time conveying the property to him to secure a larger sum than the amount so paid. It was held by Jessel M.R. that the third party, having furnished the money to pay off the mortgage, had, under the doctrine well known in equity, the best right to call for the legal estate. It appears, therefore, that the question whether the second mortgagee advanced his money with or without notice of the fraud was considered immaterial. Again, in *Sangster* v. *Cochrane* (3) there was a first legal mortgage; then a second mortgage, which was an equitable one, was given, the second mortgagee having no notice of the first; and then, at the mortgagor's request, a third party agreed for the advance to the mortgagor of 1000*l.* on a first mortgage of the property. The third party paid the first mortgagee the amount due to him on his first mortgage and took up the deeds, the amount due to the first mortgagor being less than the 1000*l.* Subsequently he advanced the remaining part of the 1000*l.* to the mortgagor, taking a conveyance by way of security for the whole amount, and again Kay J. held that the third party had the better equity to call for the legal estate. The facts in *Hosking* v. *Smith* (4) were for all practical purposes the same, and the decision was to the same effect.

(1) L. R. 3 Ch. 576.
(2) 14 Ch. D. 140.
(3) 28 Ch. D. 298.
(4) 13 App. Cas. 582.

It is said that Sir George Jessel in *Marson* v. *Cox* (1) explained the equity referred to in *Pease* v. *Jackson* (2) as arising out of contract, or implied contract, between the first mortgagee and the person by whom he was paid off. I cannot discover that there was in reality any such contract in any of the cases I have referred to, and there does not seem to be any great advantage gained by explaining what the learned Master of the Rolls refers to as a doctrine well known in equity by an implied contract. The equity would appear to be effectual, however it be explained. Further I think that, where a third party at the request of a mortgagor pays off a first mortgage with a view to becoming himself a first mortgagee of the property, he becomes, in default of evidence of intention to the contrary, entitled in equity to stand, as against the property, in the shoes of the first mortgagee. Even in the case of a purchase of an equity of redemption, where the first mortgagee is at the same time paid off and joins in a conveyance of the property to the purchaser, so that questions of merger arise, it will require strong evidence of contrary intention to preclude the Court from holding that the first mortgage debt is still alive for the purpose of protecting the purchaser of the equity of redemption from mesne incumbrances, whether at the time of purchase he knows of such incumbrances or otherwise.

The question in such cases is not whether the purchaser has shewn an intention to keep the security of the first mortgagee alive for his own protection, but whether the Court can gather that he has shewn an intention to merge it for all purposes. This seems to me to be the effect of the cases of *Phillips* v. *Gutteridge* (3), *Adams* v. *Angell* (4), *Thorne* v. *Cann* (5), and the *Liquidation Estates Purchase Co.* v. *Willoughby*. (6) In the last-mentioned case the decision of the Court of Appeal was overruled by the House of Lords, but only on the question whether as a matter of fact an intention to merge the security in question had been proved, and I think it may be useful to refer to certain passages in the judgment of Lindley L.J. in the Court of

(1) 14 Ch. D. 140.
(2) L. R. 3 Ch. 576.
(3) 4 De G. & J. 531.
(4) 5 Ch. D. 634.
(5) [1895] A. C. 11.
(6) [1896] 1 Ch. 726; [1898] A. C. 321.

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Appeal. (1) What he says is as follows: "But further, we take it to be clear that, if an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the purchaser of the property takes an assignment of it, that charge cannot be treated as still subsisting simply because the purchaser afterwards finds it would have been better for him to have kept the charge alive. That, in our opinion, is the case here." That was the point upon which they were overruled by the House of Lords. "The speculative character of Norton's claim against the other lenders, the absence of all allusion to the existence of any such claim, the absence of any assignment of his debt, the ignorance we are in even now of the amount due to him (for it is admitted that 6200*l.* is not), the recital of the agreement with Lord Windsor, and, lastly, the unusual clauses which follow the habendum, lead us to the conclusion that it was intended to extinguish Norton's claim, and not to keep it alive, except in the event of the plaintiffs failing to obtain a good title under a valid power of sale"; and, after some intermediate passages, the learned judge goes on: "If, indeed, there were some unknown mesne incumbrancer who would be let in as a first incumbrancer if Norton's charge were not treated as subsisting, it may be that, notwithstanding *Toulmin* v. *Steere* (2), it could be so treated. But why? Because in that case the purchaser would not have got what he bargained for, namely, the property free from incumbrances, and it would be manifestly unjust to allow a third party to avail himself of the terms of a deed to which he is a stranger in order to defeat the real intentions of the parties to it. It is on this ground that the Courts have gone a long way, and very properly, to prevent a second or third incumbrancer from obtaining a priority by a mere accident, and at the expense of other people who have never intended to benefit him. See for example, *Phillips* v. *Gutteridge* (3); *Anderson* v. *Pignet*. (4) This, however, is not a case in which the charge is wanted for any such purpose."

In the present case there is no question of merger, and it

(1) [1896] 1 Ch. 734.
(2) 3 Mer. 210.
(3) 4 De G. & J. 531.
(4) (1872) L. R. 8 Ch. 180.

seems, therefore, to be easier to hold that the bank's charge is still alive for the purpose of protecting the plaintiffs from the incumbrance vested in the first two defendants. Obviously the first three plaintiffs bargained for a first mortgage on the property, and the fourth plaintiff for a second charge subject only to such first mortgage. It would not, in my opinion, be just to allow the first two defendants, who were not parties to the transaction, to avail themselves of it in order to defeat the real intention of the parties, obtaining priority for themselves by a mere accident and at the expense of other people who never intended to benefit them. In my opinion, an injustice of this sort is prevented by treating the bank's charge as still alive for the plaintiffs' protection, and as I can discover no intention inconsistent with its being so kept alive, I can treat it as kept alive accordingly. I may also add that the first three plaintiffs have the title deeds of the property, and it seems to me that this alone would, under the circumstances, be sufficient to give them an equity superior to that of the first two defendants, who have no real title deeds at all.

Under the circumstances, therefore, the action succeeds and the counter-claim fails.

Solicitors for plaintiffs: *Sewell, Edwards & Nevill.*

Solicitors for first two defendants: *Wilde, Moore, Wigston & Co.*

F. E.

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BURGESS *v.* BOOTH.

[1873 B. 234.]

Conversion—Real Estate—Infant—Sale by order of Court for Costs—Surplus Proceeds—Reconversion.

Where the whole of an infant's freehold property has been sold under an order of the Court for the particular purpose of paying the residue of certain costs in an action, and the infant has subsequently married and died intestate, leaving children, the surplus proceeds of the sale, after satisfying the costs in question, will descend as realty to the heir-at-law of the intestate, and not as personalty to his next of kin.

Scott v. *Scott*, (1882) 9 L. R. Ir. 367, followed.

PETITION.

By his will dated March 6, 1865, George Massey, of Barlow Moor Lane, in Didsbury, in the county of Lancaster, the testator in the cause, directed that the residue of his estate should be given to his wife, Catherine Massey, for life, and he then bequeathed to Nelson Massey Burgess in fee the three front shops in the Turnpike Road to Manchester and the cottage in Barlow Moor Lane, all adjoining, in the county of Lancaster, allowing of the estate [*sic*] to his brother George Massey Burgess and Eli Wild and Hannah Wild during their lives, share and share alike. If the said Nelson Massey Burgess died without issue, the property was to go to his brother George Massey Burgess and his heirs for ever. The testator died on December 31, 1866, and his will was proved by the executors therein named, of whom John Booth was one.

In July, 1873, Nelson Massey Burgess, an infant, brought this action against John Booth, Eli Wild, and Hannah Wild, asking for an account of the rents and profits of the said shops and cottage, and for a receiver. By an order, dated July 28, 1874, made in the suit, it was declared that, upon the decease of Catherine Massey, each of the defendants George Massey Burgess, Eli Wild, and Hannah Wild became entitled to one fourth of the net rents and profits of the testator's three shops and the

cottage during the respective joint lives of himself, or herself, and the plaintiff; and that subject thereto, and subject to the executory limitation over in the said will contained, in the event of his dying without issue, the plaintiff became seised of the same premises, upon the death of Catherine Massey, for an estate of inheritance in fee simple; and a receiver of the rents of the three shops and cottage was appointed, with directions to pass his accounts and pay the balance into Court to the credit of the cause, to be invested in Consols. And it was declared that the costs of all parties ought to be paid out of the rents and profits of the premises, and any of the parties were to be at liberty to apply. Subsequently John Booth was appointed receiver of the rents and profits of the shops and cottage.

The costs of the various parties were taxed at 229*l.* 9*s.*

By an order made by Hall V.-C. on November 10, 1875, it was ordered that out of a sum of 86*l.* 6*s.* 8*d.* cash in Court to the credit of the cause (being money paid in by John Booth) certain apportioned sums should be paid on account of costs as therein mentioned to the parties entitled. And it was ordered that for the purposes of paying the residue of the said costs such sums as the judge should direct should be raised by mortgage of the hereditaments and premises, the subject-matter of the suit, with the approbation of the judge, or that the said hereditaments and premises be sold, with the like approbation, and that the moneys to be raised by such mortgage, or to arise by such sale, be paid into Court to the credit of the cause, with liberty to apply.

In pursuance of this order the said hereditaments and premises were sold, and the net proceeds were then represented by the sum of 1915*l.* 15*s.* 2*d.* Consolidated 3*l.* per Cent. Annuities in Court. After satisfying the costs out of the sum of 86*l.* 6*s.* 8*d.* so far as it would go, the balance of the taxed costs remaining due, namely, 143*l.* 2*s.* 4*d.*, was raised out of the fund in Court.

George Massey Burgess died on May 24, 1903, intestate, and the petitioner was his administratrix. Nelson Massey Burgess died intestate on September 22, 1905, leaving the petitioner, his widow, and five children him surviving. These children were made respondents to the petition, one of them, Nelson Burgess,

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being the heir-at-law of Nelson Massey Burgess. Letters of administration to his estate were granted to the petitioner. There was now in Court to the credit of the action, after payment of all the sums directed to be paid in respect of costs, a sum of 1569*l.* 3*s.* 2*d.* Consols, balance of the proceeds of the sale, and 83*l.* 17*s.* cash, being accumulated income on such proceeds. The question raised by the petitioner upon the petition was whether, upon the true construction of the will, and in the events which had happened, the sum in Court descended, on the death of Nelson Massey Burgess, as realty, to the respondent Nelson Burgess, as his heir-at-law, or as personalty to the next of kin.

T. E. Mansfield, for the petitioner. The absolute order for the sale of these hereditaments by the Court operates as a conversion of the property from the date of the order. That view is supported by the cases of *Steed* v. *Preece* (1) and *Hyett* v. *Mekin* (2), although, no doubt, the precise circumstances in those cases were different. The first was the case of a sale directed instead of partition, and the second was the case of a decree for sale made in an administration suit. There appears, however, to be no express authority that a sale for the mere payment of costs works a conversion for all purposes.

Austen-Cartmell, for the infant heir-at-law. There is express authority the other way in the Irish case of *Scott* v. *Scott*. (3) All the cases upon the subject are there reviewed, including *Cooke* v. *Dealey* (4), *Jermy* v. *Preston* (5), and *Foster* v. *Foster*. (6) The case of *Scott* v. *Scott* (3) decides that the conversion only takes place pro tanto, that is, for the purposes for which it is required. There is a material difference in the case of *Steed* v. *Preece* (1), where the order was for sale as a substitute for partition, and not for a particular purpose. Here the sale of the infant's estate was solely for the purpose of paying certain costs, and not for any other purpose. There was in fact no jurisdiction to sell the land except to give effect to the charge for costs. The latest case on the point is that of *Hartley* v. *Pendarves* (7), where

(1) (1874) L. R. 18 Eq. 192.
(2) (1884) 25 Ch. D. 735.
(3) 9 L. R. Ir. 367.
(4) (1855) 22 Beav. 196.
(5) (1842) 13 Sim. 356.
(6) (1875) 1 Ch. D. 588.
(7) [1901] 2 Ch. 498.

the proceeds of timber, sold under an order of the Court, were held to be personal estate. There the tenant for life and the tenant in fee in remainder of the estate which was being administered were lunatic, but the order was made under the general jurisdiction of the Court, and Cozens-Hardy J. said that, where timber had been rightfully sold under such an order, all the consequences of conversion must follow.

There is a case which points in my favour, namely, *Field* v. *Brown* (1), where money arising from the cutting of timber under an order of the Court was held to be realty. And in *Dyer* v. *Dyer* (2) that decision is recognized as correct. There are no cases where it has been expressly held that there is a conversion beyond that for which the sale was directed, though there are expressions, no doubt, in *Steed* v. *Preece* (3) pointing in that direction. That case was also followed in the later case of *Arnold* v. *Dixon*. (4)

R. F. McCall, for two life tenants.

N. C. M. MacMahon, for other children of the intestate.

T. E. Mansfield in reply.

EVE J. It seems to me in this case that the question stated, but not decided, by the Master of the Rolls in the case of *Steed* v. *Preece* (3) now comes up for determination in this country perhaps for the first time. In *Steed* v. *Preece* (3) the Master of the Rolls, having dealt with the particular facts of that case, referred to two cases which he said might at first sight appear to be antagonistic to the view which he was asked to take. Those two cases were *Jermy* v. *Preston* (5) and *Cooke* v. *Dealey* (6), and, having made some observations upon them, he says (7): "*Ackroyd* v. *Smithson* (8) does not decide that if the Court or a trustee sell more than is necessary there is any equity to reconvert the surplus for the benefit of the heir-at-law of the person entitled at the time of the sale"; and then he proceeds: "It is not necessary to decide that question now: but it seems

(1) (1859) 27 Beav. 90.
(2) (1865) 34 Beav. 504.
(3) L. R. 18 Eq. 192.
(4) (1874) L. R. 19 Eq. 113.
(5) 13 Sim. 356.
(6) 22 Beav. 196.
(7) L. R. 18 Eq. 197.
(8) (1780) 1 Bro. C. C. 503; 1 W. & T. L. C. 7th ed. p. 372.

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to me that if a conversion is rightfully made, whether by the Court or a trustee, all the consequences of a conversion must follow: and that there is no equity in favour of the heir or any one else to take the property in any other form than that in which it is found." And, no doubt, in the later case of *Hyett* v. *Mekin* (1), where an order for sale had been made in a case where infants were concerned, Kay J. adopted the language and the decision of the Master of the Rolls in *Steed* v. *Preece*. (2)

Now, in the present case the facts are these. The testator in the cause having made his will, and there being some difficulties of construction, a bill was filed in order to have the proper construction of the will ascertained, and by an order made in the cause on July 28, 1874, the Court declared that, upon the decease of the testator's widow, Catherine Massey, each of the defendants George Massey Burgess, Eli Wild, and Hannah Wild became entitled to one fourth of the net rents and profits of the testator's three shops and a cottage in Barlow Moor Lane, in the county of Lancaster, during the respective joint lives of himself, or herself, and the plaintiff, and that subject thereto, and subject to the executory limitation over in the said will contained, in the event of his dying without issue, the plaintiff became seised of the same premises, upon the death of the said Catherine Massey, for an estate of inheritance in fee simple. The plaintiff in the cause subsequently attained twenty-one, and died intestate leaving issue; and under these circumstances the executory limitation over in the will mentioned did not take effect. The question raised in this case is whether the heir-at-law became entitled or the next of kin. The decree in the matter contemplated, and made provision for, the payment of the costs of all parties as between solicitor and client out of the rents and profits of the premises. There was also a declaration that the real estate belonged to the plaintiff. I suppose that, the rents and profits being insufficient, it became necessary to make some further application to the Court; and on November 10, 1875, an order was made in which the real estate, which was declared to be the real estate of the plaintiff, subject

(1) 25 Ch. D. 735. (2) L. R. 18 Eq. 192.

to the executory devise over, was ordered to be sold. [His Lordship stated the terms of the order.]

In that state of things, the plaintiff having died intestate, and the whole of the property having been sold under that order, the question which arises is whether there is or is not an equity in favour of the heir-at-law which entitles him to say that the surplus proceeds, that is, those not required for payment of the costs, shall be treated as real estate and not as converted into personalty. That point was left entirely open by the Master of the Rolls in *Steed* v. *Preece* (1), though he did express his opinion that if there were a conversion properly directed, and even although it went further than was necessary, all the results would follow, for it had necessarily been made for all purposes. Mr. Austen-Cartmell points me to the case of *Scott* v. *Scott* (2), which was decided in Ireland, where the Vice-Chancellor in Ireland deals with the very point left open in *Steed* v. *Preece*. (1) In *Scott* v. *Scott* (2) it became necessary, during the life of Archdeacon Richard Leslie, to sell the estate in which he was interested, in order to discharge certain incumbrances due to the plaintiff in the action as mortgagee. The estate was sold under an order made in the mortgagee's action, and realized more than sufficient to discharge the amount due to the mortgagee. That balance was invested on the application of Archdeacon Leslie himself in Government stock, and so remained invested during the residue of his life. Upon his death his legal personal representative took proceedings for the payment out to him, as administrator of the moneys in Court representing the surplus proceeds. The respondent to that application was the heir-at-law of Richard Leslie, and the question was whether or not these surplus proceeds were to be taken in the condition in which they were found at the date of Richard Leslie's death, namely, as personal estate, or whether they were to be treated as payable to the heir-at-law. After going through the whole of the authorities bearing upon the point, the Vice-Chancellor came to the conclusion that, under such a state of things, there was in the heir-at-law an equity to have the surplus proceeds treated as being reconverted, and he made a declaration that the moneys should be deemed to

(1) L. R. 18 Eq. 192. (2) 9 L. R. Ir. 367.

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be a portion of the real estate of Richard Leslie, and should descend to his heir-at-law. That is the exact point which I have to consider in this case. Here, on the face of the order, which recites the taxation of the costs and the certificate and states how the costs are to be paid, it appears that the estate bequeathed was real estate, and enough was to be mortgaged, or a sufficient part of it to be sold, to raise these costs. For some reason or other, which I am unable even to gather from the materials before me, the whole of the property was sold. The proceeds were to be applied, so far as was necessary, in satisfying the charge made by this order, and the balance remained in Court during the residue of the life of the plaintiff. When he died it seems to me that there arose an equity on the part of his heir-at-law to treat the surplus moneys as real estate, and to say that the sale which was directed by the order of the Court was limited to the particular purpose of discharging the costs, and was not a conversion for general purposes. The estate was in the infant, and the conversion was only for a particular purpose, and, except to the extent to which that conversion was necessary, the infant was entitled to say that the property was to be considered as retaining its original character. On the authority, therefore, of *Scott* v. *Scott* (1), and without departing from the principle laid down in the cases of *Steed* v. *Preece* (2) and *Hyett* v. *Mekin* (3), I hold that the fund in Court passes to the heir-at-law of the late plaintiff and is not payable to his administrator or distributable amongst his next of kin. The declaration will follow the form in *Scott* v. *Scott*. (1)

Solicitors: *Sims & Syms, for Sims & Syms, Manchester.*

(1) 9 L. R. Ir. 367. (2) L. R. 18 Eq. 192.
(3) 25 Ch. D. 735.

G. M.

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Oct. 23.

In re QUICKE'S TRUSTS. POLTIMORE *v.* QUICKE.

[1907 Q. 1231.]

Insurance (Fire)—Settled Land—House in Devonshire—Settled Chattels—Infant Life Tenant—Insurances by Trustees under statutory Powers—Premiums paid out of Income—Rebuilding after Fire—Title to and application of Policy Moneys—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), *s.* 42—*Trustee Act*, 1893 (56 & 57 *Vict.* c. 53), *s.* 18—*Fires Prevention (Metropolis) Act*, 1774 (14 *Geo.* 3, c. 78), *s.* 83.

During the minority of a life tenant of settled estates in Devonshire, the trustees, acting under the powers of the Conveyancing and Law of Property Act, 1881, s. 42, and the Trustee Act, 1893, s. 18, insured (*a*) the mansion-house and (*b*) certain settled chattels and furniture against fire. The policies were taken in the names of the trustees, and the premiums were paid out of income. The house and chattels were for the most part destroyed by fire, and the trustees recovered 7000*l.* on the house policy and 1244*l.* on the chattel policy.

The trustees, the infant life tenant (aged twenty), and the remaindermen all desired the house to be rebuilt and refurnished, but the infant life tenant, who was not bound to insure, claimed that, as the premiums had been paid out of his income, the policy moneys in the hands of the trustees were his, and that he was entitled to a charge for any amount expended.

The remaindermen appeared, but took no part in the argument:—

Held, that under the Fires Prevention (Metropolis) Act, 1774, s. 83, the remaindermen were entitled to have the 7000*l.* recovered on the house policy applied in rebuilding, and that the infant life tenant was not entitled to a charge.

But *held*, that the infant life tenant was entitled to the 1244*l.* recovered on the chattel policy, to which the Fires Prevention (Metropolis) Act, 1774, s. 83, did not apply.

Seymour v. *Vernon*, (1852) 16 Jur. 189, *Warwicker* v. *Bretnall*, (1882) 23 Ch. D. 188, and *Gaussen* v. *Whatman*, (1905) 93 L. T. 101, distinguished on the first point and (*semble*) followed on the second point.

ORIGINATING SUMMONS.

By his will dated April 18, 1900, John Quicke, of Newton St. Cyres, Devonshire, devised his real estate to the plaintiffs and their heirs to the use, in the events that happened, that the testator's nephew Ernest should receive the yearly sum of 1500*l.* during his life out of the rents and profits, and, subject to that

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annuity and subject to the provisions and conditions as to residence thereinafter expressed, to the use of Ernest's eldest son for life, with remainder to the use of his first and other sons successively according to seniority in tail male; with remainder to the use of Ernest's second son for life, with remainder to the use of his first and other sons successively according to seniority in tail male; with remainder to the use of Ernest's sons thereafter to be born and their issue male in succession so that the elder of such after-born sons and his issue male should be preferred to and take before the younger of such after-born sons and their issue male, and so that each after-born son of Ernest born in the testator's lifetime should take an estate for life, with remainder to the use of his first and other sons successively according to seniority in tail male, and each after-born son of Ernest born after the testator's decease should take an estate in tail male; with remainder to the use of the testator's brother Charles for his life; with remainder to the use of Charles's eldest son John for life; with remainder to John's first and other sons successively according to their respective seniorities in tail male, with divers remainders over.

The trustees were empowered to let, repair, and insure the mansion-house in the event of the person entitled in possession ceasing to occupy it for six calendar months, which event had not happened. On such an event happening the surplus rents and profits were to be paid to the person next entitled in remainder.

During the minority of a life tenant or tenant in tail male entitled to possession the trustees were to enter and receive the rents and profits and apply the same to the maintenance and education of the minor and accumulate the surplus for his benefit.

The testator bequeathed certain chattels and furniture at his mansion-house to his trustees upon trust to settle the same so that they might be enjoyed by the person for the time being entitled to the possession of his mansion-house, yet so that the same should not for the purpose of transmission vest absolutely in any person made tenant in tail male of the mansion-house until he attained the age of twenty-one years or died under that age leaving issue him surviving.

After appointing the plaintiffs to be executors of his will and after giving certain specific and pecuniary legacies, the testator bequeathed his residuary personal estate to the plaintiffs upon trust to convert the same (except Government securities) into money, and to pay his funeral and testamentary expenses and debts and the pecuniary legacies thereout, and to stand possessed of the residue of the proceeds upon trust to invest the same in the purchase of real estate in England or Wales to be conveyed to the trustees to the same uses as the real estate thereinbefore devised.

The trust moneys until so laid out were to be invested in the Government and other securities therein mentioned, and the income was to be paid to the person who would be entitled to the rents and profits of the estates so to be purchased as if the same were then actually purchased and settled. The testator appointed his trustees for the time being to be trustees of the will for the purposes of the Settled Land Acts and of the Conveyancing and Law of Property Act, 1881.

The testator died on December 13, 1900. His only real estate consisted of the Newton St. Cyres estate, Devonshire, comprising a mansion-house known as Newton House with extensive outbuildings and gardens and about 3570 acres of land.

Ernest's eldest and only surviving son Edward, who was born on May 16, 1887, was the present life tenant of the estates, and until the happening of the fire below mentioned he had resided with his father at the mansion-house, provision in that behalf and for his maintenance having been made under orders of the Court.

The testator's brother Charles, the life tenant in remainder expectant on the complete failure of Ernest's male issue, was the first remainderman in esse.

Shortly after the testator's death the plaintiffs, acting under their statutory powers, effected two policies of fire insurance in their own names, insuring the mansion-house for 9000*l.* and the settled chattels for 2597*l.* The premiums were paid out of income.

On September 7, 1906, the mansion-house and the chattels were for the most part destroyed by fire, and the plaintiffs

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recovered 7000*l.* on the house policy and 1244*l.* on the chattel policy.

The trustees, the infant life tenant (aged twenty), and the remaindermen all desired that the mansion-house should be rebuilt and refurnished, but, as the policies had been effected and kept up out of the infant life tenant's income, the question arose whether the policy moneys in the hands of the trustees were applicable to that purpose, or whether they belonged to the infant life tenant or would belong to him on his attaining twenty-one.

The trustees issued this summons to determine these points. The summons asked two questions, namely:—

1. Whether the trustees might apply the 7000*l.* in or towards rebuilding the mansion-house.

2. Whether they might apply the 1244*l.* in or towards any and which of the following objects, namely, (*a*) the reinstatement of the chattels; (*b*) the rebuilding of the mansion-house; (*c*) the installation of electric light or acetylene gas; (*d*) as capital moneys under the Settled Land Acts.

It was estimated that the rebuilding of the house would cost over 8000*l.*, but the refurnishing would cost less than 1244*l.*

On July 22, 1907, Neville J. in chambers declared that the plaintiffs might apply the 7000*l.* towards rebuilding the mansion-house without prejudice to the right of the infant life tenant to claim that the money belonged to him and that he was entitled to a charge for any amount expended. The rest of the summons was adjourned into Court.

Northcote, for the trustees. There was no power or obligation to insure except in the case of non-residence. The insurances were therefore effected under the Conveyancing and Law of Property Act, 1881, s. 42, and the Trustee Act, 1893, s. 18. (1)

(1) The Conveyancing and Law of Property Act, 1881, provides as follows:—

Sect. 42, sub-s. 1: "If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant . . . . the trustees appointed for this purpose by the settlement . . . . may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply."

Sub-s. 2: "The trustees shall

Neither section contains any direction as to the application of the policy moneys, and the question is whether they are capital or income. In other words, are these statutory insurances effected for the benefit of the settled estate, or for the benefit of the limited owner?

Owen Thompson, for the infant life tenant. The policies were effected and kept up out of the income of the life tenant, who was not bound to insure. He is therefore entitled to the policy moneys: *Seymour* v. *Vernon* (1), Kindersley V.-C.; *Warwicker* v. *Bretnall* (2), Chitty J.

[SWINFEN EADY J. In those cases the infant was tenant in tail and the money was not required for rebuilding. Why cannot the remaindermen here insist on rebuilding?]

Perhaps they can, but in that case the life tenant claims a charge.

[SWINFEN EADY J. Why? The moneys are not his unless there is a surplus.]

In *Gaussen* v. *Whatman* (3) Kekewich J. applied *Seymour* v. *Vernon* (1) and *Warwicker* v. *Bretnall* (2) to the case of a life tenant. He said: "In the first place, here we have a tenant for life, and in the cases cited there were tenants in tail. The tenant for life is not in the same position as the tenant in tail. Of course there are fundamental differences as between a tenant for life and a tenant in tail (one need not go into that), but as regards the reasoning of the learned judges (particularly that of Chitty J.) it seems to me that they are in a case of this kind in

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manage . . . . the land, with full power . . . . to insure against loss by fire . . . ."

Sub-s. 3: "The trustees may . . . . out of the income of the land . . . . pay the expenses incurred in the management . . . ."

The Trustee Act, 1893, provides as follows:—

Sect. 18, sub-s. 1: "A trustee may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income."

(1) 16 Jur. 189.

(2) 23 Ch. D. 188, 193.

(3) 93 L. T. 101, 103.

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precisely the same position. The tenant for life is not bound to insure, and, therefore, subject to a remark to be made presently, he insures for his own benefit—that is to say, he insures or not as he pleases. He pays it out of the income which he receives as tenant for life, and it seems to me impossible to say that he is equitably bound to hold that which he recovers out of his own money for the benefit of others. The absence of liability to insure seems to me to carry with it a right to receive money, if money is forthcoming by reason of the insurance, which he was under no liability to effect." The subsequent remarks do not affect this proposition.

[SWINFEN EADY J. In that case the adult life tenant, who had insured in his own name, decided not to rebuild, and rebuilding was not insisted on. In the present case all parties desire to rebuild and any person interested can insist on having the money applied in rebuilding: Fires Prevention (Metropolis) Act, 1774, s. 83. (1)]

(1) The Fires Prevention (Metropolis) Act, 1774, intituled "An Act for the further and better regulation of buildings, and party walls; and for the more effectually preventing mischiefs by fire within the cities of London and Westminster, and the liberties thereof, and other the parishes, precincts, and places within the weekly bills of mortality . . . ." provides as follows:—

Preamble: "Whereas an Act of Parliament made and passed in the twelfth year of his present Majesty's reign, intituled, An Act for the better regulation of buildings and party-walls within the cities of London and Westminster, and the liberties thereof, and other the parishes, precincts, and places in the weekly bills of mortality, ... and for the better preventing of mischiefs by fire within the said cities, liberties, parishes, precincts, and places . . . . hath been found insufficient to answer the good purposes intended thereby: And whereas it may tend to the safety of the inhabitants . . . . within the said cities, liberties, parishes, precincts, and places, if the regulations contained in the said Act were repealed, and other regulations and provisions respecting such buildings were established by law."

Sect. 83: "And, in order to deter and hinder ill-minded persons from wilfully setting their house or houses, or other buildings, on fire, with a view of gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered . . . . it shall and may be lawful to and for the respective governors or directors of the several insurance offices for insuring houses or other buildings against loss by fire, and they are hereby authorised and required, upon the request of any person or persons interested in or intitled unto any house or houses, or other buildings which may hereafter be burnt down

Is not the Act confined to places within the weekly bills of mortality?

[SWINFEN EADY J. The contrary was decided many years ago. (1)]

The real question is whether the Court can spend the infant's money without giving him a charge.

[SWINFEN EADY J. That is a petitio principii. It is not the infant's money. The remaindermen can insist on having it applied in rebuilding.]

I cannot see any answer to the point.

Crowdy, for the remaindermen, took no part in the argument.

SWINFEN EADY J. The better plan will be to omit any question as to the chattels, and declare that, the parties entitled in remainder exercising their statutory right to require the sum of 7000*l.* received on the mansion-house policy to be applied in rebuilding the mansion-house, the said sum is to be so applied, and the infant life tenant is not entitled to any charge for the amount so applied.

. . . . to cause the insurance money to be laid out and expended . . . . towards rebuilding . . . . such house or houses or other buildings . . . . unless the party . . . . claiming such insurance money shall, within sixty days next after his . . . . claim is adjusted, give a sufficient security to the governors or directors of the insurance office . . . . that the same insurance money shall be laid out and expended as aforesaid; or unless the said insurance money shall be, in that time, settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively."

(1) Vide *Ex parte Gorely*, (1864) 4 D. J. & S. 477; 13 W. R. 60; 5 N. R. 22. The latter reports shew that the money had been paid by the office under an arrangement reserving the rights of the parties, so that a possible question whether the Act applied after payment did not arise. See 2 Davidson's Precedents, Part II. 4th ed. p. 59. Lord Westbury L.C. held that s. 83 applied beyond the bills of mortality, but some doubt was thrown on the decision in *Westminster Fire Office* v. *Glasgow Provident Investment Society*, (1888) 13 App. Cas. 699, 716, where Lord Watson said: "Having regard to the preamble of the statute, and to the general scope of its provisions, it humbly appears to me that if a question were to arise as to its applicability within the realm of England, beyond the bills of mortality, the decision in *Ex parte Gorely* would require to be carefully considered." Although the point was not discussed, it has been suggested that the present decision may aid in removing this doubt, and it is therefore now reported.

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Owen Thompson. It would be convenient if the Court would deal with the 1244*l.* chattel policy moneys.

SWINFEN EADY J. The chattels are not within the Fires Prevention (Metropolis) Act, 1774, so the 1244*l.* chattel policy moneys belong to the infant life tenant. The costs of all parties as between solicitor and client may be paid out of capital.

Solicitors: *Moon, Gilks & Moon, for Battishill & Houlditch, Exeter.*

G. R. A.

END OF VOL. I.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1908, will be as follows :—

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In the Second Series,
[1908] 1 K. B. [1908] 2 K. B. [1908] P.

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The plaintiffs, who were manufacturers, sold their goods wholesale to factors upon the terms of an agreement which provided that factors should only sell the plaintiffs' goods to dealers who had signed a retailer's agreement in a form provided by the plaintiffs. Both the factor's agreement and the retailer's agreement provided that the plaintiffs' goods should not be sold at less than the specified current list prices applicable respectively to factors and retailers, or to dealers on the plaintiffs' suspended list. The defendant company, who dealt in goods of the kind manufactured by the plaintiffs, and who had been placed on the plaintiffs' suspended list, obtained the plaintiffs' goods from a dealer, who had signed the retailer's agreement, at less than the prescribed retail price. The defendant company also employed H. and L., other defendants, to obtain the plaintiffs' goods from certain factors, who had signed the plaintiffs' factor's agreement, by falsely representing themselves as

ACTION—*continued.*

independent dealers and dealing in fictitious names. The defendant company paid the prescribed price to the factors through H. and L. and in their assumed names. In consequence of the defendant company having obtained the plaintiffs' goods the plaintiffs suffered damage in their business. In respect of both transactions the plaintiffs claimed against the defendant company for an injunction and damages :—

Held (affirming the decision of Joyce J.), that the transaction between the defendant company and the retail dealer did not give the plaintiffs any cause of action against the defendant company ; but

Held (reversing the decision of Joyce J.), that the plaintiffs were entitled to an injunction and damages in respect of the transactions between the defendant company and the factors on the ground that the defendant company, in having by fraud induced the factors to sell to them the plaintiffs' goods contrary to the duty owed by the factors to the plaintiffs, had interfered without justification with the contractual relations existing between the plaintiffs and the factors, thereby causing damage to the plaintiffs.

The law as laid down by Lord Watson in *Allen* v. *Flood*, [1898] A. C. 1, 96, and by Lord Macnaghten in *Quinn* v. *Leathem*, [1901] A. C. 495, 510, applied. NATIONAL PHONOGRAPH COMPANY, LIMITED *v.* EDISON-BELL CONSOLIDATED PHONOGRAPH COMPANY, LIMITED.
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A testator by his will, dated in 1890, devised and bequeathed all his real and personal estate to his widow and appointed her his sole executrix. He died in 1891 insolvent. The widow did not prove the will. In 1907 a judgment was given for the administration of his real and personal estate. Between the date of testator's death and the date of the judgment H. purchased and had assigned to him certain bond and simple contract debts due from the testator and also took transfers of certain mortgages upon the testator's real estate. In exercise of the powers of sale contained in the mortgages H. sold the mortgaged properties, and after paying himself principal and interest out of the proceeds there remained in his hands a balance which he claimed to set off in satisfaction pro tanto of the debts due to him from the testator's estate:—

Held, that the purchase by H. after the testator's death of the debts and the transfers to him of the mortgages followed by a sale under the powers of sale were not "mutual dealings" between him and the testator's estate within s. 38 of the Bankruptcy Act, 1883, and that he was not therefore entitled to the right of set-off he claimed. *In re* GEDNEY. SMITH *v.* GRUMMITT – – – – **Warrington J. 804**

2. —— *Practice—Administration Action—Breach of Trust alleged in Pleadings—Breach made good after issue of Writ—Common Account and Inquiries—Adding Accounts and Inquiries after Judgment—Breaches of Trust not alleged in Pleadings and proved at Trial—"Wilful Default"—Removal of Trustees, Grounds for.*

Where in an administration action a plaintiff by his pleadings charges trustees with a breach of trust, but at the trial is content to take the common form administration judgment, the Court will refuse to allow him at a later stage of the action to charge the trustees with further breaches of trust alleged to have been committed before the issue of the writ or before the judgment, but not alleged in the pleadings and proved at the trial, either for the purpose of obtaining relief against them on account of such breaches of trust, or merely for the purpose of removing them from their office of trustees.

The rule that, if in an action for administration the plaintiff by his pleadings alleges wilful default and proves one instance of it, the Court will direct an account on the footing of wilful default does not apply to the case of a breach of trust.

Job v. Job, (1877) 6 Ch. D. 562; *Mayer* v. *Murray*, (1878) 8 Ch. D. 424; *In re Symons*, (1882) 21 Ch. D. 757; *Smith* v. *Armitage*, (1883) 24 Ch. D. 727, distinguished on the above ground.

In an administration action the Court has jurisdiction at any time during the proceedings to remove trustees if it considers such removal necessary for the preservation of the trust estate or the welfare of the cestuis que trust, and that notwithstanding such removal has not been expressly asked for by the pleadings. *In re* WRIGHTSON. WRIGHTSON *v.* COOKE **Warrington J. 789**

3. —— *Statute-barred Debt owing to Estate—Residuary Legatee also Residuary Legatee of Debtor's Estate—Statute-barred Debt brought into Account.*

A., entitled to a share in the residuary estate of a testator, was also the sole residuary legatee of a debtor to the testator's estate. No payment or acknowledgment on account of either principal or interest had been made for more than twenty years:—

Held, that A. must bring the debt and interest into account against his share in the testator's residuary estate.

The principle of *Courtenay* v. *Williams*, (1844) 3 Hare, 539; on appeal, (1846) 15 L. J. (Ch.) 204, applied. *In re* BRUCE. LAWFORD *v.* BRUCE – – – – **Neville J. 850**

—— "Widow"—Will—Construction—Bigamous marriage — Secondary meaning of "widow" – – – – **162**
See WILL. 15.

ADVANCES — Executors — Gift of residue — Express trust—Advancements to children by testator – – – **71**
See WILL. 4.

—— Interest, Rate of — Hotchpot — Share of residue—Advances in testator's lifetime
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—— Shares of residue—Advances in lifetime of testator — Subsequent authorized advances by trustees—Hotchpot – **828**
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ADVERTISEMENTS — Patent — Petition for revocation—Motion to amend specification – – – – – – **847**
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AFTER-ACQUIRED PROPERTY—Covenant to settle—Contingent reversionary interests not falling into possession during coverture – – – – – **265**
See SETTLEMENT. 1.

—— Covenant to settle—Dissolution of marriage—Appointment to self—Settled land in Ireland—Bonus – – – **681**
See SETTLEMENT. 2.

AIR—*Easement—Nature of Right—Derogation from Grant—Obstruction.*

A right to the access of air to a defined aperture over a servient tenement may be

AIR—*continued.*

acquired though there is no defined channel over the servient tenement through which the air flows.

The grant of such a right may be implied from general words in a conveyance of a building from a grantor entitled in fee to the adjoining land though such land is subject to a lease.

On January 19, 1905, the H. Company conveyed to the plaintiff in fee a piece of land with a stable on it. The stable was ventilated by apertures to which the air had access over an open yard which the company owned in fee subject to a lease for a term of which twenty-eight years were unexpired. On August 3, 1905, the company conveyed the yard to the defendant, the lessee joining to merge the term. The defendant put up a hoarding entirely closing the ventilators of the stable :—

Held, on the principle of derogation from a grant, that neither the company nor the defendant as their assignee could erect anything on the yard which prevented the use of the stable as a stable. A mandatory injunction granted to remove the hoarding. CABLE *v.* BRYANT
Neville J. 259

ALTERNATIVE GIFT — Alternative original gift of personalty—"Surviving children and their respective issue"—Issue competing with parents – – – 320
See WILL. 12.

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ANTICIPATION — Restraint on — Annuity — Release by married woman—Covenant not to sue—Acquiescence—Action by administrator for arrears of annuity
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ARMY—Will—Condition — Forfeiture — Entering naval or military services — Invalidity—Public Policy – – 383
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ASSIGNMENT — Copyright — Drawings — Designs — Assignment of copyright to intended company—Validity – 433
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ATTORNEY-GENERAL—Joinder of—Necessity for—Amendment—Terms—Pontypridd Waterworks Act – – – 388
See WATER.

BANK OF ENGLAND—*Transfer of Stock—Execution by Person appointed to execute on Neglect or Refusal by Stockholder ordered to execute—Indemnity of Bank—Form of Order—Judicature Act*, 1884 (47 & 48 *Vict. c.* 61), *s.* 14—*National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *ss.* 22, 66.

S., having recovered judgment against J. N. and R. N. in the King's Bench Division and obtained a charging order on stock standing in their respective names in the books of the Bank of England, commenced proceedings in the Chancery Division against J. N. and R. N. to obtain a sale of so much of the stock as would provide sufficient to pay the amount due under the charging order, and on June 29, 1907, Warrington J. made an order for sale by S. out of Court of portions of the stock, and that the proceeds should be received by S. in discharge of the amount found due to him, and that within seven days after service of the order J. N. and R. N. should transfer to S. the stock ordered to be sold, and in case they should neglect to do so, the Court appointed the Stock Exchange broker of the Court to execute the transfer, and ordered him to do so.

The Bank of England's advisers not being satisfied that it was protected by the order, the Bank was by arrangement joined as a defendant in the proceedings in the Chancery Division, and thereupon S. applied to Parker J. asking that, as J. N. and R. N. had neglected to transfer the stock, the Bank might be ordered to act on the order of June 29, and to suffer a transfer of the stock ordered to be sold to be executed in the books of the Bank by the Court broker, or, alternatively, for a fresh order for sale of the stock to satisfy the claim of S. The Bank objected (1.) that any order made should be intituled "In the matter of the Judicature Act, 1884" ; (2.) that the Court could not, under s. 14 of that Act, make one anticipatory order for (*a*) execution of a transfer by stockholders, and (*b*) for execution of the transfer by some other person in case of non-compliance ; and (3.) that it was not clear that, under an order framed in the manner proposed, the Bank would be entitled to

BANK OF ENGLAND—*continued.*

any indemnity under the National Debt Act, 1870.

Held—(1.) that it was unnecessary and inconvenient to alter the title of the order by referring to the Act of 1884, although as a matter of convenience the order might state that it was made under s. 14 of the Act; (2.) that (without deciding that there was no case in which the Court could make an anticipatory order) before making an order under s. 14 the Court ought as a rule to be satisfied that the person originally ordered to execute a document had neglected or refused to comply with the order, and that in the present case an anticipatory order ought not to be made; and (3.) that, as execution by the Court broker of the transfer would in effect be the act of the stockholders, the Bank would be indemnified under the National Debt Act, 1870.

The matter was subsequently brought before the Court, when the Bank urged (1.) that in a case like this there was no indemnity to the Bank; and (2.) that if the Bank was ordered to allow a transfer by the Court broker it should only be on a condition imposed under s. 14 of the Act of 1884 that S. should indemnify the Bank:—

Held—(1.) that when once an order had been made under s. 14, and acted on, the transfer executed by the appointed person had the same effect as if it had been executed by the stockholder, and the Bank was at any rate impliedly indemnified for acting on the order, even if the order turned out to have been invalidly made; and (2.) that, even if the condition asked for could be imposed under s. 14, it ought not to be imposed in the present case.

Form of order. SAVAGE *v.* NORTON **Parker J. 290**

BANKRUPTCY—*Adjudication—Secured Creditors—Proof—Lumping Debts and Securities—Aggregate assessed Value—No separate Assessment—Shares in Ships—Vendor's Lien—Admission of Proof—Composition—Annulment of Bankruptcy—Revesting—Debtor's Right to Redeem.*

The plaintiff was adjudicated bankrupt on August 26, 1899. The defendants, who had various debts and various securities, sent in their proof as secured creditors, lumping together their debts and securities and claiming to prove for the balance. The trustee admitted the proof without separating the debts or having the separate value of the several securities assessed in the proof. Subsequently a scheme for composition was approved, and on payment of the composition the bankruptcy was annulled on March 6, 1901, and the outstanding estate of the plaintiff ordered to revest in him. In January, 1907, the plaintiff commenced an action for redemption of the securities:—

Held, that at and previous to the composition the estate of the plaintiff held by the defendants, having regard to the proof, formed a security to them for the aggregate assessed value of their securities, and that they had nothing more than a security then or at time of action brought, and that the plaintiff was entitled to redeem all the

BANKRUPTCY—*continued.*

securities upon payment of interest from the date of proof.

Quære whether, apart from the special circumstances of the case, the defendants were in strictness secured creditors in respect of their vendors' lien for the unpaid purchase-moneys of shares in ships, which shares had been sold by them to the plaintiff but still remained registered in their names and had never been transferred by them; and whether these were secured debts.

PEARCE *v.* BULLARD, KING & CO. **Joyce J. 780**

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—— *Allen* v. *Flood* – [1898] A. C. 1, 96
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—— *Alven* v. *Bond* – (1841) Fl. & K. 196
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—— *Annaly's (Lady) Trust, In re*, (1904) 92 L. T. 13.
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—— *Attorney-General* v. *Metcalf & Greig*, [1907] 2 Ch. 23.
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—— *Ayscough* v. *Bullar*, (1889) 41 Ch. D. 341
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—— *Baggs, In re* – – [1894] 2 Ch. 416, n.
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—— *Baynes & Co.* v. *Lloyd & Sons*, [1895] 1 Q. B. 820, 826; [1895] 2 Q. B. 610, 615, 616.
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—— *Bear Island Defence Works and Doyle, In re*, [1903] 1 I. R. 164.
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—— *Bell* v. *Holtby*, (1873) L. R. 15 Eq. 178
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—— *Berry* v. *Gaukroger* [1903] 2 Ch. 116
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—— *Bisgood* v. *Nile Valley Co.*, [1906] 1 Ch. 747
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—— *Bower* v. *Smith*, (1871) L. R. 11 Eq. 279
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—— *Broad, In re* – – [1901] 2 Ch. 86
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—— *Brown* v. *Gellatly*, (1866) L. R. 2 Ch. 751
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—— *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, 313.
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—— *Cardigan* v. *Curzon-Howe*, (1888) 40 Ch. D. 338, 342.
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—— *Chesterfield (Earl of)* v. *Fountaine*, [1908] 1 Ch. 243, n.
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—— *Chesterfield's (Earl of) Trusts, In re*, (1883) 24 Ch. D. 643.
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—— *Clarke* v. *Franklin*, (1858) 4 K. & J. 257
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—— *Cornbrook Brewery Co.* v. *Land Debenture Corporation*, [1904] 1 Ch. 103.
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—— *Corsellis* v. *London County Council*, [1907] 1 Ch. 704.
Affirmed by C. A. – **[1908] 1 Ch. 13**

—— *Cotton* v. *Imperial and Foreign Agency and Investment Corporation*, [1892] 3 Ch. 454.
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—— *Courtenay v. Williams*, (1844) 3 Hare, 539; on appeal, (1846) 15 L. J. (Ch.) 204.
Principle of, applied by Neville J. *In re* BRUCE – – **[1908] 1 Ch. 850**

—— *Cowper* v. *Scott* (1731) 3 P. Wms. 119
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—— *Devonport Corporation* v. *Tozer*, [1903] 1 Ch. 759.
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—— *Dibden* v. *Skirrow* – [1907] 1 Ch. 437
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—— *Discoverers Finance Corporation, Ld., In re*, [1908] 1 Ch. 141.
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—— *Dodson, In re* – – [1907] 1 Ch. 284
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—— *Donaldsons* v. *Becket* (1774) 4 Burr. 2408
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—— *Dover Coalfield Extension, Ld., In re,* [1907] 2 Ch. 76.
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—— *Du Cane and Nettlefold's Contract, In re,* [1898] 2 Ch. 96, 108.
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—— *Duguid* v. *Fraser* – (1886) 31 Ch. D. 449
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—— *Egbert* v. *Short* – – [1907] 2 Ch. 205
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—— *Evans* v. *Davis* – (1878) 10 Ch. D. 747
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—— *Fenn* v. *Smart* (1810) 12 East, 444, 448
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—— *Hall* v. *May* – (1857) 3 K. & J. 585
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—— *Leigh* v. *Taylor* – – [1902] A. C. 157
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—— *London United Tramways Act*, 1900, *In re*, [1906] 1 Ch. 534.
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—— *Magnolia Metal Co.'s Trade Marks, In re*, [1897] 2 Ch. 371.
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—— *Mayer* v. *Murray* – (1878) 8 Ch. D. 424
Distinguished by Warrington J. *In re* WRIGHTSON – – [1908] **1 Ch. 789**

—— *Michell's Trusts, In re* – (1878) 9 Ch. D. 5
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—— *Millar* v. *Taylor*, (1769) 4 Burr. 2303, 2396
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—— *Moore, In re* – – [1901] 1 Ch. 691
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[1908] **1 Ch. 136**

—— *Morse* v. *Martin* – (1865) 34 Beav. 500
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[1908] **1 Ch. 560**

—— *Mundy and Roper's Contract, In re*, [1899] 1 Ch. 275, 289.
Explained and applied by Swinfen Eady J. *In re* DICKIN AND KELSALL'S CONTRACT – – [1908] **1 Ch. 213**

—— *Nugent* v. *Nugent* – – [1907] 2 Ch. 292
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—— *Ockleston* v. *Heap*, (1847) 1 De G. & Sm. 640.
Held to have been overruled by *Hall* v. *May*, (1857) 3 K. & J. 586, and not followed by Swinfen Eady J. *In re* WAIDANIS – – [1908] **1 Ch. 123**

—— *O'Connell, In re* – – [1903] 2 Ch. 574
Not followed by Eve J. TREMAYNE *v.* RASHLEIGH – – [1908] **1 Ch. 681**

—— *Pett* v. *Fellows* (1733) 1 Swans. 561, n.
Distinguished by Swinfen Eady J. *In re* CRANE – – [1908] **1 Ch. 379**

—— *Power, In re* – – [1901] 2 Ch. 659
Dissented from by Neville J. *In re* ORLEBAR – – [1908] **1 Ch. 136**

—— *Power's Estate, In re* – [1907] 1 I. R. 51
The view taken of the nature of the bonus in, adopted by Eve J. TREMAYNE *v.* RASHLEIGH [1908] **1 Ch. 681**

CASES—*continued.*

—— *Price, In re* – – – [1900] 1 Ch. 442
Followed by Joyce J. *In re* WALKER
[1908] **1 Ch. 560**

—— *Prince Albert* v. *Strange*, (1849) 2 De G. & Sm. 652, 695 ; 1 Mac. & G. 25, 42.
Discussed and applied by Swinfen Eady J. MANSELL *v.* VALLEY PRINTING COMPANY – – [1908] **1 Ch. 567**

—— *Quinn* v. *Leathem* [1901] A. C. 495, 510
The law as laid down by Lord Macnaghten in, applied by C. A. NATIONAL PHONOGRAPH COMPANY *v.* EDISON-BELL CONSOLIDATED PHONOGRAPH COMPANY – – [1908] **1 Ch. 335**

—— *Raven* v. *Waite*, (1818) 1 Swans. 553, 559
Followed by Swinfen Eady J. *In re* CRANE – – [1908] **1 Ch. 379**

—— *Reg.* v. *Cambrian Ry. Co.*, (1871) L. R. 6 Q. B. 422, 430.
A dictum of Blackburn J. in, can no longer be supported. DIBDEN *v.* SKIRROW – – **C. A.** [1908] **1 Ch. 41**

—— *Richards, In re* – (1869) L. R. 8 Eq. 119
Distinguished by Swinfen Eady J. *In re* CRANE – – [1908] **1 Ch. 379**

—— *Ripley* v. *Paper Bottle Co.*, (1887) 57 L. J. (Ch.) 327.
Not followed by Neville J. LAMB *v.* SAMBAS RUBBER AND GUTTA PERCHA COMPANY – – [1908] **1 Ch. 845**

—— *Ripley* v. *Waterworth* (1802) 7 Ves. 425
Discussed by Eve J. *In re* LORD GRIMTHORPE – – [1908] **1 Ch. 666**

—— *Roberts* v. *Walker*, (1830) 1 Russ. & My. 752.
Applied by Swinfen Eady J. *In re* SPENCER COOPER – [1908] **1 Ch. 130**

—— *Roby, In re. Howlett* v. *Newington*, [1907] 2 Ch. 84.
Affirmed by C. A. – [1908] **1 Ch. 71**

—— *Salaman, In re. De Pass* v. *Sonnenthal*, [1907] 2 Ch. 46.
Reversed on one point by C. A.
[1908] **1 Ch. 4**

—— *Scott* v. *Scott* – (1882) 9 L. R. Ir. 367
Followed by Eve J. BURGESS *v.* BOOTH – – – [1908] **1 Ch. 880**

—— *Sebright's Settled Estates, In re*, (1886) 33 Ch. D. 429, 438.
Not followed by Swinfen Eady J. *In re* DICKIN AND KELSALL'S CONTRACT – – – [1908] **1 Ch. 213**

—— *Seymour* v. *Vernon* (1852) 16 Jur. 189
Distinguished on one point and (*semble*) followed on another point by Swinfen Eady J. *In re* QUICKE'S TRUSTS
[1908] **1 Ch. 887**

—— *Sharman, In re* – – [1901] 2 Ch. 280
Applied by Swinfen Eady J. *In re* SPENCER COOPER – [1908] **1 Ch. 130**

—— *Sidney, In re. Hingeston* v. *Sidney*, [1908] 1 Ch. 126.
Affirmed by C. A. – [1908] **1 Ch. 488**

CASES—*continued.*

—— *Simper* v. *Foley* – (1862) 2 J. & H. 555
Doubted by C. A. HYMAN *v.* VAN DEN BERGH – – – [1908] 1 Ch. 167

—— *Simpson* v. *Hartopp*, (1744) Willes, 512; 1 Sm. L. C. p. 437 (11th edit.).
Discussed by C. A. CHALLONER *v.* ROBINSON – – [1908] 1 Ch. 49

—— *Smith* v. *Armitage* – (1883) 24 Ch. D. 727
Distinguished by Warrington J. *In re* WRIGHTSON – – [1908] 1 Ch. 789

—— *Smith* v. *Claxton* – (1820) 4 Madd. 484
Applied by Swinfen Eady J. *In re* SPENCER COOPER – [1908] 1 Ch. 130

—— *Spiral Globe, Ld.* (*No.* 2), *In re*, [1902] 2 Ch. 209.
Followed by Neville J. *In re* NEW LONDON AND SUBURBAN OMNIBUS COMPANY – – [1908] 1 Ch. 621

—— *Steward* v. *Poppleton* – [1877] W. N. 29
Not followed by Eve J. TREMAYNE *v.* RASHLEIGH – [1908] 1 Ch. 681

—— *Stroud* v. *Gwyer* – (1860) 28 Beav. 130
Followed and approved by C. A. SLADE *v.* CHAINE – – [1908] 1 Ch. 522

—— *Sutton Coldfield Grammar School, In re*, (1881) 7 App. Cas. 91, 93.
Applied by Swinfen Eady J. *In re* BETTON'S CHARITY – [1908] 1 Ch. 205

—— *Symons, In re* – (1882) 21 Ch. D. 757
Distinguished by Warrington J. *In re* WRIGHTSON – – [1908] 1 Ch. 789

—— *Tapling* v. *Jones* – (1865) 11 H. L. C. 290
Discussed and explained by C. A. HYMAN *v.* VAN DEN BERGH [1908] 1 Ch. 167

—— *Townshend* v. *Harrowby*, (1858) 27 L. J. (Ch.) 553; 4 Jur. (N.S.) 353.
Followed by Eve J. TREMAYNE *v.* RASHLEIGH – – [1908] 1 Ch. 681

—— ——, Considered by Parker J. LLOYD *v.* PRICHARD – – [1908] 1 Ch. 265

—— *Trash* v. *Wood* – (1839) 4 My. & Cr. 324
Applied by Eve J. *In re* HUDSON [1908] 1 Ch. 655

—— *Treasure, In re* – – [1900] 2 Ch. 648
Dissented from by Neville J. *In re* ORLEBAR – – [1908] 1 Ch. 136

—— *Trenchard, In re* – – [1905] 1 Ch. 82
Distinguished by Swinfen Eady J. *In re* SPENCER COOPER [1908] 1 Ch. 130

—— *Vachell* v. *Jeffereys* – (1701) Prec. Ch. 170
Examined and followed by C. A. *In re* ROBY – – – [1908] 1 Ch. 71

—— *Wagstaff, In re. Wagstaff* v. *Jalland*, [1907] 2 Ch. 35.
Affirmed by C. A. – [1908] 1 Ch. 162

—— *Warrick* v. *Queen's College, Oxford*, (1871) L. R. 6 Ch. 716.
Followed by Neville J. LORD CHESTERFIELD *v.* HARRIS [1908] 1 Ch. 230

CASES—*continued.*

—— *Warwicker* v. *Bretnall*, (1882) 23 Ch. D. 188.
Distinguished on one point and (*semble*) followed on another point by Swinfen Eady J. *In re* QUICKE'S TRUSTS [1908] 1 Ch. 887

—— *West* v. *Lawday* – (1865) 11 H. L. C. 375
Considered by Joyce J. *In re* BROCKET [1908] 1 Ch. 185

—— *Wheeler* v. *Sheer* – – (1730) Mos. 301
Examined and followed by C. A. *In re* ROBY – – – [1908] 1 Ch. 71

—— *Williams* v. *Arkle*, (1875) L. R. 7 H. L. 606.
Applied by C. A. *In re* ROBY [1908] 1 Ch. 71

—— *Yolland, Husson & Birkett, Ld., In re. Leicester* v. *Yolland, Husson & Birkett, Ld.* – – – [1907] 2 Ch. 471
Affirmed by C. A. – [1908] 1 Ch. 152

CERTIFICATE—Company—Debentures—Registration—Certificate of registrar—Conclusiveness of certificate – – 152
See COMPANY.

CESSER—Two settled estates—No longer "principal mansion-house"—Tenant for life—Restriction on powers – 593
See SETTLED LAND. 6.

CHARGE—Company—Debentures.
See under COMPANY.

CHARITY — *Charity Organization Society, Bequest to, in Trust "for such other Society or Societies as shall in the opinion of the governing Body be most in need of Help"—Ejusdem generis—Invalidity.*

Testator, after making bequests to two missionary societies, gave the residue of his estate to the treasurer for the time being of the Charity Organization Society in trust to invest the same, and out of the annual income thereof to retain one-tenth part "for the purposes of the society as the governing body may think fit, and to divide and pay the residue of such annual income to such other society or societies as shall, in the opinion of the governing body of the Charity Organization Society, be most in need of help, besides fulfilling the standard of good management, efficiency, and economy of such Charity Organization Society"; and the testator appointed the plaintiff and the treasurers for the time being of the Charity Organization Society executors and trustees of his will:—

Held, that the gift of the nine-tenths of the income residue was not a valid charitable bequest. *In re* FREEMAN. SHILTON *v.* FREEMAN – – – – – C. A. 72

2. —— *Emigration Uses, Charitable or—Gift—Uncertainty.*

A bequest in trust for "such charitable uses or for such emigration uses, or partly for such charitable uses and partly for such emigration uses" as the trustees should think fit, *held* void for uncertainty.

CHARITY—*continued.*

Decision of Swinfen Eady J., [1908] 1 Ch. 126. affirmed. *In re* SIDNEY. HINGESTON *v.* SIDNEY – – – – – **C. A. 488**

3. —— *Mixed Endowment—Scheme determining what Part held for Education—Effect of Scheme—Permanent or temporary—Board of Education Act*, 1899 (62 & 63 *Vict. c.* 33), *s.* 2, *sub-s.* 2—*Board of Education (Powers) Order in Council*, 1902.

A testator who died in 1724 gave his residue to trustees in trust to pay half the income for the redemption of Barbary slaves, one-fourth for certain educational charities, and one-fourth for certain non-educational charities.

In 1846, for want of Barbary slaves, the slave fund income was applied by a Court scheme to assisting charity schools.

By the Board of Education Act, 1899, s. 2, sub-s. 2, the powers of the Charity Commissioners in matters appearing to relate to education may be transferred by Order in Council to the Board of Education, provided that any question whether any part of an endowment "is held for or ought to be applied to educational purposes" shall be determined by the Charity Commissioners.

By the Board of Education (Powers) Order in Council, 1902, it is ordered that all powers (except the powers of appointing official trustees and making vesting orders) shall, so far as those powers relate to endowments "held solely for educational purposes," be transferred to the Board, and where the Charity Commissioners, in exercise of the powers conferred on them by the Charitable Trusts Acts, 1853 to 1894, or the Endowed Schools Acts, 1869 to 1899, determine by scheme or otherwise what part of a mixed endowment is "held for educational purposes," that part shall, "for the purposes of this order," be treated as an educational endowment "held solely for educational purposes."

In 1907 the Charity Commissioners made a scheme under the Charitable Trusts Acts, 1853 to 1894, determining (inter alia) that the slave fund income was "held for and ought to be applied to educational purposes."

The trustees appealed, contending that the effect of the determination scheme would be to devote the income permanently and in all events to educational purposes. At present, notwithstanding free education, there were managers' purposes to which the income was and could be applied under the scheme of 1846 without relieving the rates. but when these expenses also were thrown on the rates there would be no proper objects left under the scheme of 1846. On that event the income ought to be applied cyprès the will as a non educational charity :—

Held, that the determination scheme merely determined the controlling body for the time being. and did not in any way restrict. alter, or affect the objects of the charity or prevent the income being applied by a future scheme to non-educational purposes.

In re Sutton Coldfield Grammar School, (1881) 7 App. Cas. 91, 93, applied. *In re* BETTON'S CHARITY – – – **Swinfen Eady J. 205**

CHARITY ORGANIZATION SOCIETY.
See under CHARITY.

CHATTELS—Bequest of—Tapestries—Right of removal—Question between devisee and legatee – – – – – **615**
See FIXTURES.

CHILDREN.
See under INFANT.

CLASS—Will—Bequest to a class of children "born" previously to date of will—Child en ventre sa mère – – **4**
See WILL. 2.

CLUB—Pictures sent for exhibition and sale—Proprietary club — Privilege from distress – – – – – **49**
See DISTRESS.

CODICIL—Appointment—Donee domiciled in Scotland—Power duly exercised by will—Holograph codicil—Defective execution aided – – – – **560**
See POWER OF APPOINTMENT. 1.

—— Legacy—Forfeiture condition—Codicil—Substituted settled legacy—Incidents of original legacy applicable – **599**
See WILL. 6.

COMPANY—*Action to rescind Contract for Shares — Unpaid Calls—Notice to forfeit Shares — Interim Injunction restraining Forfeiture—Payment into Court—Practice.*

Where in an action to rescind a contract to take shares the company have given notice to forfeit the shares for non-payment of calls, the Court will, on the plaintiff giving the usual undertaking in damages and paying into Court the amount of the call with interest, restrain the company from forfeiting the shares until the trial of the action.

Ripley v. *Paper Bottle Co.*, (1887) 57 L. J. (Ch.) 327, not followed. LAMB *v.* SAMBAS RUBBER AND GUTTA PERCHA CO., LIMITED
Neville J. 845

2. —— *Debenture—Floating Security—Issue of further Debentures—Specific Charge—Priority—Pari passu—Ordinary Course of Business.*

The defendant company was formed in 1890 with very extensive powers and a very large capital. It issued debentures for 3,700,000*l.* out of a total authorized issue of 6,000,000*l.* These debentures were headed "first mortgage debentures," and by them the company purported to create a floating charge on all its property, but this was not to interfere (until default in payment of principal or interest and steps taken to enforce payment) with the dealing with the property by the company. By condition 1 of the debenture it was stated to be "one of an issue of like debentures for the aggregate sum of *l.*,—part of the said authorized issue of 6,000,000*l.*—the whole of which debentures of such authorized issue are intended to rank pari passu as a first charge upon all the company's property," and the company reserved the right to issue the balance. By condition 17 a meeting

of debenture-holders might "sanction the creation and issue by the company of debentures or any other security ranking as part of or pari passu with the before mentioned 6,000,000*l.* debentures and to such amounts and bearing such rates of interest and generally on such terms and conditions as may be sanctioned or prescribed at any such meeting."

The company proposed to issue further debentures, and two schemes were suggested—(1.) to create in favour of trustees a fixed and specific charge upon specific assets of the company to secure the new debentures without any floating charge, the total debenture debt not to exceed the 6,000,000*l.*; (2.) to issue further debentures of the authorized 6,000,000*l.*, the company to create a specific charge in favour of trustees to secure these debentures as in the first scheme.

The plaintiff was a holder of debentures of the company, and he now moved for an injunction restraining the company from issuing securities which should constitute a charge on the company's assets ranking in front of or pari passu with the 6,000,000*l.* first mortgage debentures without first obtaining the assent of a meeting of the debenture-holders, as provided by the conditions indorsed on the debentures :—

Held, that if a rule existed that a company which had given a floating charge could not subsequently create a specific charge except in the course of its ordinary business, it applied to companies which were strictly speaking trading companies; that this was not in the ordinary sense a trading company, but that, if it were, the Court would not assume, in the absence of evidence to that effect, that the schemes were otherwise than in the ordinary course of its business; that the provision of the debenture that the security was not to interfere with the company dealing with its property was in general terms; that the 17th condition only referred to floating charges, and did not prevent the creation of specific charges or specific assets; and that there was no reason why the company should not carry out these proposals. COX MOORE *v.* PERUVIAN CORPORATION, LIMITED **Warrington J. 604**

3. —— *Debentures — Registration — Certificate of Registrar—Conclusiveness of Certificate —Companies Act*, 1900 (63 *&* 64 *Vict. c.* 48), *s.* 14.

The certificate of the Registrar of Joint Stock Companies under s. 14 of the Companies Act, 1900, is conclusive evidence that all the requirements of the section as to the registration of debentures have been complied with, and where such a certificate has been granted the Court will refuse to go into the question whether such requirements have in fact been complied with.

Decision of Warrington J., [1907] 2 Ch. 471, affirmed. *In re* YOLLAND, HUSSON & BIRKETT, LIMITED. LEICESTER *v.* YOLLAND, HUSSON & BIRKETT, LIMITED – – – **C. A. 152**

4. —— *Debentures — Registration — Creation of Charge — Re-issue — Companies Act*, 1900 (63 *&* 64 *Vict. c.* 48), *s.* 14—*Companies Act*, 1907 (7 *Edw. c.* 50), *s.* 15.

Three years before January 1, 1901 (when

s. 14 of the Companies Act, 1900, came into operation), a company conveyed and assigned all its present and future real and personal property (including uncalled capital) to trustees to secure an issue of debentures, each of which gave to the registered holder thereof a first charge on the freehold and leasehold property of the company and a floating charge on all its other assets. A few days after the execution of the trust deed the debentures were sealed and issued, seven of them (for 100*l.* each) being issued to A. In 1902 the company purchased from A. the seven debentures and took a transfer of them to U. as its nominee. U. at once deposited them and a blank transfer with a bank to secure an overdraft.

In 1905 the seven debentures were delivered up to the company and cancelled, and the company issued one debenture for 700*l.*, but otherwise in the same form, to R. to secure a cash advance. This debenture was never registered under s. 14 of the Companies Act, 1900. In January, 1907, a winding-up order was made against the company, and on August 28 there came into operation s. 15 of the Companies Act, 1907 (which retrospectively validates the security of re-issued debentures under certain circumstances). In a debenture-holders' action commenced on the same day, the question arose whether, having regard to the non-registration of the debenture given to R., he had any security under either it or the trust deed :—

Held—(1.) that the winding-up order was not an order pronounced before March 7, 1907, "as between the parties to the proceedings in which . . . . the order was made" within the meaning of s. 15, sub-s. 5, of the Companies Act, 1907; (2.) that there had been a keeping alive and re-issue of the original debentures within the meaning of s. 15, sub-s. 1; and (3.) that as the charge claimed by R. was created on the execution of the trust deed before January 1, 1901, and not when he advanced money to the company, non-registration of the debenture did not affect his security.

In re Spiral Globe, Ld. (*No.* 2), [1902] 2 Ch. 209, followed.

Quære, whether the re-issued debenture would have required registration if it had been issued in the place of debentures requiring registration under the Act of 1900. *In re* NEW LONDON AND SUBURBAN OMNIBUS COMPANY. APPLEYARD *v.* SAME COMPANY **Neville J. 621**

5. —— *Director's Remuneration—Qualification Shares received as Trustee—Liability of Director to account to Cestui que Trust for Remuneration.*

The D. Company transferred certain shares which it held in the K. Company to C., one of its directors, in order to qualify him to become a director of the K. Company, the intention being that C. should represent the interests of the D. Company on the board of the K. Company, and C. executed a declaration of trust of the shares in favour of the D. Company :—

Held, that the remuneration received by C. as director of the K Company was not profit

COMPANY—*continued.*

received by him from the use of the property of the D. Company, and that C. was under no liability to account for that remuneration to the D. Company.

Decision of Warrington J., [1907] 2 Ch. 76, affirmed. *In re* DOVER COALFIELD EXTENSION, LIMITED - - - - - **C. A. 65**

6. —— *Mortgage — Registration — "Charge created by the Company"—Debenture Stock—Covering Deed—Sale of Part of mortgaged Property—Substitution of other Property—Companies Act*, 1900 (63 *&* 64 *Vict. c.* 48), *s.* 14.

Where property is conveyed by a company to trustees to secure debentures or debenture stock, and the trust deed empowers the trustees to sell any part of the property conveyed before the security is enforceable, and with the proceeds to purchase other property which is to be held upon the like trusts, and the trustees sell part of the property, and with the proceeds of sale purchase other property which is conveyed by the vendor to them upon the trusts of the trust deed, the company not being a party to the conveyance, the conveyance is not a mortgage or charge requiring registration under s. 14 of the Companies Act, 1900.

Cornbrook Brewery Co. v. *Land Debenture Corporation*, [1904] 1 Ch. 103, distinguished. BRISTOL UNITED BREWERIES, LIMITED *v.* ABBOT - - - - **Parker J. 279**

7. —— *Reconstruction — Memorandum of Association—Sale of Undertaking to New Company for partly-paid Shares—Distribution of Consideration—Ultra Vires — Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 38, *sub-s.* 4; *s.* 161.

The sale of all a company's assets and all its undertaking and the distribution of the proceeds cannot be a corporate object so that under a clause for that purpose introduced into the memorandum of association such a sale and distribution can be made without regard to the provisions of s. 161 of the Companies Act, 1862.

A company limited by shares cannot by its memorandum and articles of association provide as part of its constitution that in an event the corporator shall either submit to a liability in excess of the limit of liability on his shares or shall be dispossessed of his status as corporator.

Where, therefore, a limited company, which had issued 1,770,386 fully-paid shares of 1*l.* each, acting under the powers of its memorandum and articles of association, passed resolutions in general meeting approving a scheme of reconstruction and for a voluntary winding-up, and by the scheme the undertaking of the company was to be sold to a new company to be formed for the purpose in consideration of a like number of 1*l.* shares in the new company, credited with 17*s.* 6*d.* per share as paid thereon, and the payment of the debts and the costs of liquidation of the old company, and the liquidator was to offer the shares in the new company (credited as aforesaid) for distribution among the members of the old company at the rate of one of such new shares for each share in the old company held by such members, and in the event of any of the members

COMPANY—*continued.*

not accepting their due proportion of such shares within a limited time, was to use his best endeavours to sell such shares and distribute the net proceeds among the non-accepting members in proportion to the number of shares in the old company held by them respectively:—

Held, that the scheme was ultra vires.

Cotton v. *Imperial and Foreign Agency and Investment Corporation*, [1892] 3 Ch. 454, and *Fuller* v. *White Feather Reward, Ld.*, [1906] 1 Ch. 823, overruled.

Bisgood v. *Nile Valley Co.*, [1906] 1 Ch. 747, approved.

Decision of Eve J. reversed. BISGOOD *v.* HENDERSON'S TRANSVAAL ESTATES, LIMITED **C. A. 743**

8. —— *Register of Members—Rectification—Deceased Member — Executors, whether to be described as such in Register — Order of Entry of Names—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 25, 30, 35.

The articles of association of a company provided (article 13) that the company should not be bound by nor recognize any equitable, contingent, future, or partial interest in any share, nor (except only as by its regulations otherwise expressly provided) any right or trust in respect of a share other than an absolute right thereto in accordance with its regulations, in the persons from time to time registered as the holders thereof; (article 14) that every member should be entitled to a certificate under the seal of the company specifying the share or shares held by him, and the amount paid up thereon; (article 24) that the executors or administrators of a deceased member, not being one of several joint owners, should be the only persons recognized by the company as having any title to his share or shares; (article 25) that any person becoming entitled to a share in consequence of the death of any member, or by any lawful means other than by an ordinary transfer, might be registered as a member upon such evidence of title being produced as might from time to time be required by the directors; and (article 26) that any person who had become entitled to a share in consequence of the death of any member might, instead of being registered himself, elect to have some person, to be named by him, registered as a transferee of such shares.

M. was the registered holder of shares of the company. Upon his death his executors requested the company to register them as members in respect of the shares formerly held by him. The company refused to register the executors in the company's books otherwise than in their representative capacity and as being the parties entitled to legally transfer the shares held by the deceased. On an application by the executors to rectify the register:—

Held, that applicants were entitled to have their names entered on the company's register, without any statement that they held the shares in a representative capacity, and to have them inserted in such order as they chose. *In re* T. H. SAUNDERS & CO., LIMITED **Warrington J. 415**

COMPANY—*continued.*

9. —— *Shareholders—General Meeting—New Regulations—Special Resolution—Notice—Sufficiency—"General Nature" of Business—Non-disclosure—Director's Pension—Agreement—Incidental to Ordinary Business—Ultra Vires—Action by Shareholders—Right to Sue.*

The notice of an extraordinary general meeting of a limited company stated the purpose of the meeting to be to consider and, if thought fit, approve the draft new regulations to be submitted to the meeting, and to pass a resolution approving and adopting the same. It also stated that copies of the proposed new regulations might be seen at the offices of the company, or would be forwarded to shareholders on application. The new regulations contained an article enabling the board to grant a retiring pension to any managing director, and confirming an agreement of January 17th, 1902, by which the directors, acting on behalf of the company, agreed to pay to one of the retiring managing directors, for consideration, an annual sum of 1000*l.* for ten years, and 500*l.* a year thereafter for the remainder of his life. There were also other new articles (inter alia)—(1.) enabling the board to increase the remuneration of the directors from 3000*l.* to 4500*l.* per annum, and allowing them travelling, hotel, and other expenses; (2.) providing for the appointment of three directors for life; (3.) relieving directors from liability for loss; and (4.) enabling the directors to borrow a further sum of 150,000*l.*

The resolution adopting the new regulations was passed at the meeting and confirmed at a second extraordinary general meeting.

In an action by the shareholders against the company and the directors to test the validity of the resolutions:—

Held, that the notice of the general meeting, by reason of its omission to refer to the specified matters which were all of importance to the shareholders, did not sufficiently state the "general nature" of the business, as required by the articles of association, and that the resolutions were therefore not duly passed.

What is to be deemed sufficient notice of the general nature of the business must be determined from the particular circumstances of each case by itself.

Held, also, that the agreement of January 17, 1902, although within the powers of the company in general meeting, was ultra vires the directors without the sanction of such a meeting, as it purported to grant additional remuneration to a director, which, according to the articles, could only be effected by a resolution of the company in general meeting.

But *held*, that the shareholders were not entitled to maintain the action at all, and must appeal to the company in general meeting in respect of the irregularity committed by the directors.

No managing or other director is a "person in the employment of the company." NORMANDY *v.* IND, COOPE & CO., LIMITED **Kekewich J. 84**

10. —— *Winding-up—Contributory—Transfer of Shares to escape Liability—Validity—Test — Out-and-out Transfer — Bona fides—Equities between Transferor and Transferee.*

Appeal from the decision of Parker J., [1908] 1 Ch. 141. Settlement arrived at. *In re* DISCOVERERS FINANCE CORPORATION, LIMITED **C. A. 334**

COMPANY—*continued.*

11. —— *Winding-up—Validity—Contemporaneous Resolution for voluntary Winding-up and Reconstruction Scheme—Invalidity of Scheme.*

A resolution for a voluntary winding-up is not invalid by reason of its being passed contemporaneously and in concert with resolutions for a reconstruction scheme which are held to be invalid.

Dictum of Turner L.J. in *In re Imperial Bank of China, India, and Japan*, (1866) L. R. 1 Ch. 339, 347, explained and distinguished.

Cleve v. *Financial Corporation*, (1873) L. R. 16 Eq. 363, approved. THOMSON *v.* HENDERSON'S TRANSVAAL ESTATES, LIMITED **C. A. 765**

12. —— *Winding-up—Voluntary Liquidator—Removal of—By whom Applications may be made to the Court in a voluntary Winding-up—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 138, 141—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 25.

All applications to the Court in a voluntary winding-up are made under s. 138 of the Companies Act, 1862, and the fact that a creditor is enabled to apply under the section (by s. 25 of the Companies Act, 1900) may give him a locus standi to apply under the latter part of s. 141 of the Act of 1862 for the removal of a liquidator and the appointment of another liquidator in the voluntary winding-up.

But the omission from the latter part of s. 141 of the words "on the application of a contributory" (which occur in the former part of the section with reference to the appointment of a liquidator where there is no liquidator) does not authorize an application by a person who is not the liquidator, or a contributory, or a creditor of the company. *In re* DE KAAP, LIMITED **Neville J. 589**

—— Water company.
See under WATER COMPANY.

COMPOUND SETTLEMENT—Consent of tenant for life—Conflict of powers **812**
See SETTLED LAND. 3.

CONDITION—Will—Forfeiture—Entering naval or military services—Invalidity—Public policy **383**
See WILL. 3.

—— Will — Legacy — Forfeiture condition — Codicil—Substituted settled legacy—Incidents of original legacy applicable **599**
See WILL. 6.

CONDITIONS OF SALE—Copyholds — Title — Conditional surrender by way of mortgage—Principal and interest statute-barred **853**
See VENDOR AND PURCHASER.

CONSENT—Tenant for life—Compound settlement—Conflict of powers – – **812**
See SETTLED LAND. 3.

CONTINGENT REVERSIONARY INTERESTS—Not falling into possession during coverture—After-acquired property—Covenant to settle – – – **265**
See SETTLEMENT. 1.

CONTRACT—Service—Repudiation—Wrongful dismissal — Undertaking — Breach — Right of master to sue – – **537**
See MASTER AND SERVANT.

CONTRIBUTORY — Company — Winding-up — Transfer of shares to escape liability—Validity—Test – – – – **334**
See COMPANY. 10.

CONVERSION—*Real Estate—Infant—Sale by Order of Court for Costs—Surplus Proceeds—Reconversion.*

Where the whole of an infant's freehold property has been sold under an order of the Court for the particular purpose of paying the residue of certain costs in an action, and the infant has subsequently married and died intestate, leaving children, the surplus proceeds of the sale, after satisfying the costs in question, will descend as realty to the heir-at-law of the intestate, and not as personalty to his next of kin.

Scott v. *Scott*, (1882) 9 L. R. Ir. 367, followed.
BURGESS *v.* BOOTH – – – **Eve J. 880**

—— Power to postpone conversion—Residue—Advances—Hotchpot – – – **828**
See WILL. 10.

—— Real estate — Resulting trust — Re-conversion—Will—Election—Estate duty—Incidence – – – – **666**
See SETTLEMENT. 4.

CONVEYANCE—Concurrence in—Sale by life tenant — Mortgagee of life estate—Consent – – – – – **213**
See SETTLED LAND. 4.

CONVEYANCING AND LAW OF PROPERTY ACT—Insurance—Rebuilding after fire—Title to and application of policy moneys—Settled land – – **887**
See INSURANCE (FIRE).

—— Lease—Assignment to limited company carrying on a brewery business – **10**
See LANDLORD AND TENANT. 1.

—— Trustee—Appointment of new trustees—"Acting executor of last surviving trustee" – – – – – **180**
See TRUSTEE. 1.

—— Trustee—"Persons who are the trustees of the will of A."—Executors of last surviving trustee – – – **123**
See TRUSTEE. 3.

COPYHOLDS—Real estate—Resulting trust—Descent—Customary or common law heir – – – – – – **655**
See WILL. 7.

COPYHOLDS—*continued.*

—— Sale of copyholds—Costs—No tenant on court rolls—Fine on heir's admission—Steward's fees – – – – **493**
See LANDS CLAUSES ACTS.

—— Title—Conditional surrender by way of mortgage — Principal and interest statute-barred—Conditions of sale **853**
See VENDOR AND PURCHASER.

COPYRIGHT—"*Drawings*"—*Designs*—*Assignment of Copyright to intended Company*—*Registration*—*Validity of Assignment*—*Goods imported after, in Execution of an Order given before, Registration*—*Infringement*—*Injunction*—*Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *ss.* 1, 4, 9, 11—*Patents, Designs and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 47, 48, 60.

M., trading as M. & L., was the author of original drawings and designs for decorating Christmas cards. Dies of the drawings or designs were engraved, and from such dies copies or reproductions of the drawings or designs were struck off or stamped, generally in gold leaf, and were then affixed to the cards. In February, 1905, M. contracted with the trustee of an intended company, to be called M. & L., Limited, for the sale to the company, when incorporated, of his business and the copyright of his drawings and designs; and on March 1, 1905, M. signed an instrument whereby he assigned to M. & L., Limited, the copyright of all his drawings and designs. On March 3, 1905, the company was incorporated, and afterwards executed the usual adoptive agreement. In September, 1906, the company registered M.'s drawings or designs under the Fine Arts Copyright Act, 1862, and entered on the register March 1 as the date of their assignment, and M. & L. and M. & L., Limited, as the names of the parties thereto. In an action by the company against P. for infringing their copyright in the registered drawings:—

Held, that M.'s drawings or designs were proper subject-matter for registration as "drawings" under the Fine Arts Copyright Act, 1862, and that the copyright extended to the right of multiplying copies or reproductions of them by the method above stated.

Held, also, that for the purposes of the register March 1 was the true date of the assignment, and that the names of the parties thereto were truly stated, notwithstanding that the company did not come into existence until March 3.

Held, also, that the importation into the United Kingdom of copies of the drawings after registration, in pursuance of an order given before registration, was an infringement of the company's copyright and entitled them to an injunction. MILLAR & LANG, LIMITED *v.* POLAK – – – – **Neville J. 433**

2. —— *International Copyright — Foreign Musical Composition—Registration—Right of Public Performance reserved—Notice in French Language—Unauthorized Performance in England—"Wilfully" causing or permitting unauthorized Performance—Injunction—Copyright*

COPYRIGHT—*continued.*

Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 11, 20—*International Copyright Act*, 1844 (7 & 8 *Vict. c.* 12), *ss.* 5, 6—*Copyright* (*Musical Compositions*) *Act*, 1882 (45 & 46 *Vict. c.* 40), *ss.* 1, 2—*International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33), *ss.* 4, 6—*The Berne Convention*, 1887, *arts.* 2, 11—*Copyright* (*Musical Compositions*) *Act*, 1888 (51 & 52 *Vict. c.* 17), *s.* 3.

The registration of musical compositions required by the International Copyright Act, 1844, is in substitution for, and not in addition to, the registration required by the Copyright Act, 1842. Where, therefore, the proprietor of international copyright in a musical composition is, by virtue of s. 4 of the International Copyright Act, 1886, and the Berne Convention and the Orders in Council adopting the same, relieved from registration under the Act of 1844, registration under the Act of 1842 is unnecessary.

If the proprietor under international copyright of the exclusive right of public performance of musical compositions desires to retain it in this country, he must print, or cause to be printed, upon the title-page, of every copy published in this country the notice reserving such right required by s. 1 of the Copyright (Musical Compositions) Act, 1882, and such notice must be printed, not in a foreign, but in English.

Where the proprietor, tenant, or occupier of any place of entertainment, at which an unauthorized performance of a musical composition takes place, does not "wilfully cause or permit such unauthorized performance knowing it to be unauthorized," he is by virtue of s. 3 of the Copyright (Musical Compositions) Act, 1888, not liable to any penalties or damages thereof; and in such a case an injunction will not be granted against him unless he threatens and intends to continue the performance. SARPY *v.* HOLLAND **Neville J. 443**

3. —— *Unpublished Picture—Common Law Right—Infringement—Pirated Copy—Innocent Publication—Damages.*

Any person who, however innocently, publishes a pirated copy of an unpublished picture, not registered under the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), is liable to damages for infringement of the exclusive owner's common law right of property in the picture.

Millar v. *Taylor*, (1769) 4 Burr. 2304, 2396; *Donaldsons* v. *Becket*, (1774) 4 Burr. 2408; *Prince Albert* v. *Strange*, (1849) 2 De G. & Sm. 652, 695, 1 Mac. & G. 25, 42; *Jefferys* v. *Boosey*, (1854) 4 H. L. C. 815, 867, 979; *Mayall* v. *Higbey*, (1862) 1 H. & C. 148; and *Hollins* v. *Fowler*, (1875) L. R. 7 H. L. 757, 795 (trover), discussed and applied. MANSELL *v.* VALLEY PRINTING COMPANY – **Swinfen Eady J. 567**

CORPORATION—*Municipal Corporation—Council Meetings—Right of Public to attend—Burgess — Newspaper Reporter — Right to exclude—Injunction—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 233; *Sched. II., r.* 5.

In a municipal borough neither the public, nor the burgesses, nor reporters for newspapers, have the right to attend the meetings of the borough council without the consent of the council expressed or implied.

Decision of Kekewich J. affirmed.

Semble, the same principle applies to the meetings of a district council or of a county council. MAYOR, ALDERMEN, AND BURGESSES OF TENBY *v.* MASON – – – **C. A. 457**

CORPORATION—*continued.*

COSTS—Copyholds, Sale of—No tenant on court rolls — Fine on heir's admission — Steward's fees – – – – **493**
See LANDS CLAUSES ACTS.

—— Counsel employed against client's instructions—Solicitor and client costs **282**
See SOLICITOR. 2.

—— Patent — Petition for revocation—Motion to amend specification – – **847**
See PATENT.

—— Solicitors'.
See under SOLICITOR.

COUNCIL MEETINGS—Municipal corporation—Right of public to attend—Burgess—Newspaper reporter—Right to exclude—Injunction – – – – **457**
See CORPORATION.

COUNSEL.
See under BARRISTER.

—— Rules as to Employing Council, 1892, r. 20 – – – – – – **282**
See SOLICITOR. 2.

COVENANT — After-acquired property — Covenant to settle — Bonus — Irish Land Acts – – – – – – **681**
See SETTLEMENT. 2.

—— After-acquired property — Covenant to Settle — Contingent reversionary interests not falling into possession during coverture – – – **265**
See SETTLEMENT. 1.

—— Annuity—Release by married woman—Covenant not to sue—Acquiescence—Action by administrator for arrears of annuity – – – – – **424**
See HUSBAND AND WIFE. 2.

—— Fixtures—Tenant's convenant to deliver up demised premises with fixtures — Surrender and creation of new tenancy – – – – – – **641**
See LANDLORD AND TENANT. 2.

—— Lease—Covenant against assignment without consent — Assignment to limited company carrying on a brewery business – – – – – – **10**
See LANDLORD AND TENANT. 1.

—— Mining lease—Proviso for re-entry—Breach of covenant—Forfeiture—Unequivocal demand for possession – – **575**
See LANDLORD AND TENANT. 3.

CUSTOM—Married woman — Mortgage — Separate examination—Acknowledgment—Burgage tenure – – – – **303**
See HUSBAND AND WIFE. 1.

CUSTOMARY HEIR—Real estate—Copyholds—Resulting trust — Descent—Customary or common law heir – – – **655**
See WILL. 1.

DAMAGE — Action, Cause of—Special goods—Fraud—Interference with contractual relation – – – – – **335**
See ACTION.

—— Party wall—Damage by smoke– – **630**
See EASEMENT.

DAMAGES — Unpublished picture—Common law right — Infringement—Pirated copy—Innocent publication – – – **567**
See COPYRIGHT. 3.

DEATH — Company — Register of members — Rectification — Deceased member — Executors, whether to be described as such in register – – – – **415**
See COMPANY. 8.

DEBENTURES — Registration — Certificate of registrar — Conclusiveness of certificate – – – – – – **152**
See COMPANY. 3.

—— Registration—Mortgage—Debenture stock —Covering deed—Substitution of other property – – – – – **279**
See COMPANY. 6.

DEBENTURE-HOLDERS AND DEBENTURES —Company.
See under COMPANY.

DEBT—Statute-barred debt owing to estate—Brought into account – – **850**
See ADMINISTRATION. 3.

DEED—*Misrepresentation as to Contents—Plea of Non est factum.*

The defendant, a solicitor, who was formerly a managing clerk to one H., acted as his nominee in a building speculation relating to certain property at E. of which H. was the owner. Shortly after leaving H.'s employment he was requested by H. to execute certain deeds, and on asking what those deeds were he was told by H. that they were deeds transferring the E. property. The defendant thereupon signed them. One of the deeds so signed was a mortgage between the defendant, as mortgagor, of the one part and W. of the other part, and contained the usual covenant by the mortgagor for payment of principal and interest. In an action by a transferee of the mortgage for payment of the principal debt and interest the defendant pleaded non est factum :—

Held (affirming the decision of Warrington J., [1907] 1 Ch. 537), that, the misrepresentation being only as to the contents of a deed known by the defendant to deal with the property, the plea failed, and that the defendant was liable on the covenant.

DEED—*continued.*

Dictum of Swinfen Eady J. in *Baghot* v. *Chapman*, [1907] 2 Ch. 222, 227-8, doubted.

Quære whether the old authorities on the plea of non est factum extend beyond cases where the party is blind or illiterate. HOWATSON *v.* WEBB – – – – – – – **C. A. 1**

DEROGATION—From grant.
See under GRANT.

DESCENT—Real estate—Copyholds—Resulting trust—Descent—Customary or common law heir – – – – – **655**
See WILL. 7.

DESIGN—Registration as trade mark – **197**
See TRADE MARK. 1.

DESIGNS—"Drawings"—Assignment of copyright to intended company—Registration—Validity of assignment – **433**
See COPYRIGHT. 1.

DIRECTOR—Remuneration—Liability of director to account to cestui que trust for remuneration – – – – **65**
See COMPANY. 5.

DISENTAILING ASSURANCE — Estate tail — Protector—Three persons appointed by settlor—Death of two – – **26**
See SETTLEMENT. 3.

DISMISSAL—Contract of service—Repudiation —Wrongful dismissal – – – **537**
See MASTER AND SERVANT.

DISTRESS—*Goods of Underlessee—Distress for Rent due from Head Lessee — Exemptions — Proprietary Club—Public Trade—Pictures sent for Exhibition and Sale—"Managed" in the Way of Trade—Privilege from Distress.*

The plaintiff was the proprietor of the United Arts Club ; he was tenant from year to year of the club premises as underlessee ; he undertook all the liabilities of the club and received all the profits. One of the objects of the club was to hold exhibitions of pictures sent in by members of the club, mostly for sale on commission, the plaintiff receiving a commission of 10 per cent. as his profit. The club was managed by a committee, of which the plaintiff was a member, and the exhibitions were managed by a picture committee. Only members or associates of the club could send pictures, and the exhibitions were not open to the public on payment, but to persons introduced by members or invited. The defendants, as superior landlords, had put in a distress for rent due from the lessee, and had seized certain pictures then on the club premises, the property of members, which had been sent in for exhibition and sale. In an action by the plaintiff to restrain the defendants from proceeding with the distress :—

Held by Neville J., that the pictures were liable to distress unless the plaintiff could bring his case within the exceptions laid down in *Simpson* v. *Hartopp*, (1744) Willes, 512 ; 1 Sm. L. C. p. 437 (11th ed.), as "things delivered to a person exercising a public trade to be . . . .

DEED—*continued.*

managed in the way of his trade or employ." In the present case the plaintiff was not carrying on the trade of a commission agent with all who chose to deal with him; his trade was essentially a private trade, and for this reason the pictures were not within the exemption.

Held, on appeal, that it was not necessary on the facts to consider the meaning of the words "public trade," but that the word "managed" must be taken to include, if not to be equivalent to, "disposed of"; that the pictures were not delivered to the plaintiff, but to the picture committee, and even if they were delivered to the plaintiff, they were not delivered to him "to be managed in the way of his trade," which was that of a club proprietor, and not that of a private dealer; that the plaintiff could not be said to "manage" the pictures, which, according to the rules of the club, were under the management of the committee. On these grounds, therefore, the plaintiff's action failed, and the appeal must be dismissed.

The words used by Willes C.J. in *Simpson* v. *Hartopp* must be taken to define and limit precisely the things privileged from distress, and the Court cannot go beyond the terms in which that privilege is defined. CHALLONER *v.* ROBINSON - - - - - **C. A. 49**

DISTRIBUTIONS, STATUTE OF—Partial intestacy — Next of kin — Hotchpot — Advancements made to children by testator - - - - - **71**
See WILL. 4.

DRAWINGS — Designs — Assignment of copyright to intended company—Registration—Validity of assignment - **433**
See COPYRIGHT. 1.

DUTY—Public revenue.
See under REVENUE.

EASEMENT—*Party-wall—Damage by Smoke.*

Prior to 1886 plaintiff's predecessor in title built C. House on his own land with a wall to the west, in which were flues and fireplaces used only for C. House, and on the west side flues and fireplaces not so used, but which might be used for any adjoining house built on an adjoining and then vacant piece of land belonging to the defendant.

In 1886 the defendant, being about to build a house on his land, agreed in writing with plaintiff's predecessor for the sale to the defendant of the western half of the western wall of C. House, that wall being treated as divided from top to bottom, throughout its whole length, by a vertical plane in the centre thereof (which plane, if it had been a physical division, would have divided half of each of the flues, including those used for C. House, from the other half). The defendant then built on his land a house called G. adjoining C. House, and so connected with it that the fireplaces on the west side and the flues connected with them were used for the purposes of G., as had been intended. The plaintiff purchased C. House in 1900, and subsequently the flue connected with the defendant's dining-room became

EASEMENT—*continued.*

defective, in the sense that by reason of cracks which developed in the surrounding masonry smoke found its way therefrom through the plaintiff's half of the party-wall into his rooms and occasioned damage. The cracks were caused by a subsidence in the defendant's house, but the cause of the subsidence was undetermined, and there was no evidence of negligence by the defendant in building his house or otherwise, or want of reasonable precaution:—

Held, that the defendant was not liable for the damage.

Where a man grants a divided moiety of an outside wall of his house with intent to make it a party-wall between that house and a house to be built on his neighbour's adjoining land, the law implies the grant and reservation, in favour of the grantor and grantee respectively, of such easements as may be necessary to carry out the common intention as to the user of the wall, the nature of the easements varying with the particular circumstances of each case.

Subject to such easements, the owner of each half may deal with it in such manner as he pleases, and if he uses it only for the contemplated purposes and without negligence or want of reasonable care and precaution, he is not liable for any nuisance or inconvenience occasioned by such user. JONES *v.* PRITCHARD **Parker J. 630**

—— Air.
See under AIR.

—— Light.
See under LIGHT.

EDUCATION.
See under SCHOOLS.

EMIGRATION—Gift—Charitable or emigration uses—Uncertainty - - - **488**
See CHARITY. 2.

ENDOWMENT—Schools.
See under SCHOOLS.

EN VENTRE SA MÈRE—Child—Will—Construction—Bequest to a class of children "born" previously to date of will- **4**
See WILL. 2.

ELECTION—Real estate—Resulting trust—Reconversion — Will — Election — Estate duty—Incidence - - - **666**
See SETTLEMENT. 4.

ESTATE DUTY.
See under REVENUE.

ESTATE TAIL—Disentailing assurance—Protector — Three persons appointed by settlor—Death of two- - - **26**
See SETTLEMENT. 3.

EXECUTION—Appointment—Donee domiciled in Scotland—Power duly exercised by will — Holograph codicil — Defective execution aided - - - - **560**
See POWER OF APPOINTMENT. 1.

—— Power—"Writing or writings"—Appointment made by will—Validity - **402**
See POWER.

EXECUTOR—Company—Register of members—Rectification—Deceased member—Executors, whether to be described as such in register – – – – – **415**
See COMPANY. 8.

—— Gift of residue—Express trust—Advancement to children by testator—Hotchpot
See WILL. 4. **71**

—— Trustee.
See under TRUSTEE.

—— Will—No next of kin—Residue undisposed of—Beneficial title of executors – **552**
See WILL. 5.

FALSA DEMONSTRATIO — Specific devise — Complete general description – **185**
See WILL. 11.

FERRY—*Franchise—Ancient Ferry—Bridge—Traffic diverted—Disturbance of Ferry.*
The franchise of a ferry is not a grant of an exclusive right to carry across a stream by any means whatever, but only a grant of the exclusive right to carry across by means of a ferry.
Where, therefore, a bridge was constructed by private enterprise connecting the same highways as the ferry, whereby the ferry-owner lost all the income he used to receive from tolls :—
Held, that the bridge was not a disturbance of the ferry, and that the ferry-owner had no remedy.
The dictum of Blackburn J. on this point in *Reg.* v. *Cambrian Ry. Co.*, (1871) L. R. 6 Q. B. 422, 430, can no longer be supported.
Hopkins v. *Great Northern Ry. Co.*, (1887) 2 Q. B. D. 224, discussed and followed.
Decision of Neville J., [1907] 1 Ch. 437, affirmed. DIBDIN *v.* SKIRROW – **C. A. 41**

FINANCE ACTS.
See under REVENUE.

FINE—Copyholds, Sale of—Costs—No tenant on court rolls—Fine on heir's admission—Steward's fees – – – – **493**
See LANDS CLAUSES ACTS.

FINE ARTS COPYRIGHT.
See under COPYRIGHT.

FINES AND RECOVERIES ACT—Estate tail—Disentailing assurance — Protector — Three persons appointed by settlor—Death of two – – – – **26**
See SETTLEMENT. 3.

—— Married woman — Mortgage — Separate examination—Acknowledgment — Burgage tenure—Custom—Reasonableness
See HUSBAND AND WIFE. 1. **303**

FIRE INSURANCE.
See under INSURANCE (FIRE).

FISHERY—*Riparian Owners — River within Limits of Manor — Freeholders of Manor—Common of Fishery—Profit à prendre—Fluctuating Body—Prescription—Presumption of Legal Origin.*
A claim by prescription for the freeholders of a manor to a free fishery or common of fishery in a river within the limits of the manor is a right in the nature of a profit à prendre, and is legally capable of proof.
Warrick v. *Queen's College, Oxford*, (1871) L. R. 6 Ch. 716, and *Earl of Chesterfield* v. *Fountaine*, [1908] 1 Ch. 243, n., followed.
Where such a right is established by evidence the Court may presume a grant from the lord to an individual of a right to fish in common with the other freeholders within the manor, accompanying each original grant of a freehold, or, in the case of a royal manor, a grant from the Crown incorporating the freeholders within the manor.
A grant of a right to fish without stint appurtenant to land is good, and need not be limited to a user for the tenant and his domestic servants, and may be granted in common to the owners of several parcels of land, although the subsequent sub-division of the lands may lead to an indefinite increase in the number of persons entitled to exercise the right. LORD CHESTERFIELD *v.* HARRIS – – – **Neville J. 230**

2. —— *Riparian Owners — River within Limits of Manor — Freeholders of Manor—Common of Fishery — Prescription—Right to Fish.*
WILLS J. I think the appeal must be dismissed. The magistrates have found that this claim is made bona fide ; and that, therefore, we need not further discuss. The only other question is whether the claim is one which by law can be made. It may not have been put forward in very correct technical language before the magistrates, but we must not be nice about a matter of that kind if we see that in substance a right is claimed which is capable of existing and that there is some evidence about it. Now the right as it seems to me is capable of being claimed when it is expressed in proper phraseology. The allegation is that at some time or other, the epoch being lost in the mists of antiquity, the owner of the soil or bed of this river—the lord of the manor—granted to each of his freehold tenants the right to himself, his heirs and assigns, to fish in it. In the natural course of things, if such a grant as that were made, the freeholders who would enjoy the benefit of that grant might be multiplied ; and, if the right were originally granted in respect of 50,000 acres or 100,000 acres, it might very well be that by the present time there would be 100,000 persons competent to exercise the right. A good deal of the argument on behalf of the appellant has rested, I think, upon the failure to observe the proper distinction between rights which are claimed by custom and rights which are claimed by prescription. A custom must be reasonable, and a custom which destroys the subject-matter of the grant would not be reasonable. A right claimed by prescription is subject to no limitation, as far as its use and reasonableness is concerned, and the owner of the soil, that is, the owner of the bed of the river, has a perfect right if he chooses, if the fishing belongs to him, to grant a right to fish to any number of persons although it may destroy his own right. Therefore the fact that the right may be exercised by

FISHERY—*continued.*

an unlimited number of persons is not a circumstance that is fatal to the prescription. It is a circumstance to be taken into consideration when one comes to consider, as a matter of fact, whether the prescription is made out by the evidence, and in dealing with each question of course you would always be apt to take, as one of the circumstances making against the probability of it, the fact that it is capable of indefinite multiplication. That goes no further than its being a matter of observation on the evidence. It seems to me it was perfectly competent for the lord of the manor at the outset, or the owner of the freehold, being at the same time the owner of the bed or soil of this part of the river, the part upon which this so-called right is claimed—and nothing could prevent him from granting the right in question if he choose—to grant the right to the owners of a particular freehold and to their heirs and assigns. EARL OF CHESTERFIELD *v.* FOUNTAINE, (1895 January 21)
Div. Ct. [1908] 1 Ch. 243, n.

FIXTURES—*Tapestries—Right of Removal—General Scheme of Decoration—Devise of House—Bequest of Chattels—Question between Devisee and Legatee.*

The testator in his lifetime bought a house in which the former owner had fitted and decorated the dining-room as a perfect specimen of an Elizabethan room. As part of this scheme of decoration certain pieces of tapestry had been fixed to the walls by being nailed upon wooden frames which were kept in their place by the mouldings of an oak dado and frieze above it which were fastened to the wall by screws. A picture of Queen Elizabeth, attributed to Zucchero, painted on wood, was similarly fixed in its place over the fireplace by the mouldings of an overmantel which had apparently been constructed for the picture. The picture and tapestries were bought by the testator as part of the house and included in its price. The testator by his will gave his wife all the furniture and chattels in the house, and devised the house to trustees upon trust to permit her to reside there during widowhood, and then upon trusts under which his grandson had become absolutely entitled :—

Held, that the picture and tapestry, having been fixed as part of a general scheme of decoration and not for their better enjoyment as chattels, passed under the devise of the house and not under the gift of chattels.

Leigh v. *Taylor*, [1902] A. C. 157, distinguished. *In re* WHALEY. WHALEY *v.* ROEHRICH – – – – – **Neville J. 615**

—— Tenant's covenant to deliver up demised premises with fixtures—Surrender and creation of new tenancy – – **641**
See LANDLORD AND TENANT. 2.

FLOATING SECURITY—Company—Debentures
See COMPANY. 2. **604**

FOOTWAY—Streets—Tramway—Dedication to public—Road authority—Powers – **13**
See LONDON. 2.

FOREIGN MUSICAL COMPOSITION—Registration—"Wilfully" causing or permitting unauthorized performance — Injunction – – – – – – **443**
See COPYRIGHT. 1.

FOREIGN PROPERTY — Parties resident in England—Practice – – – **856**
See JURISDICTION.

FORFEITURE — Company — Unpaid calls — Notice to forfeit shares—Interim injunction restraining forfeiture — Practice
See COMPANY. 1. **845**

—— Mining lease—Proviso for re-entry—Breach of covenant—Issue of writ containing inconsistent claims – – – **575**
See LANDLORD AND TENANT. 3.

—— Will—Condition—Entering naval or military services — Invalidity — Public policy – – – – – **383**
See WILL. 3.

—— Will — Legacy — Forfeiture condition — Codicil — Substituted settled legacy—Incidents of original legacy applicable
See WILL. 6. **599**

FRANCHISE—Ancient ferry—Bridge — Traffic diverted – – – – – **41**
See FERRY.

FRAUD—Sale of goods—Special goods—Fixed prices—Action, Cause of—Damage **335**
See ACTION.

GOODS—Sale of.
See under SALE OF GOODS.

GRANT—Air — Easement — Nature of light — Derogation from grant — Obstruction
See AIR. **259**

—— Derogation from grant — Disturbance induced by landlord—Action by tenant —Third party notice by landlord for indemnity – – – – **697**
See LANDLORD AND TENANT. 4.

"HEIGHT"—Building not of uniform height—"Front or nearest external wall" **327**
See LONDON. 1.

HEIRLOOMS—Power of trustees to insure heirlooms and pay premiums out of income of capital moneys – – – **821**
See SETTLED LAND. 1.

HOLOGRAPH CODICIL.
See under CODICIL.

HOTCHPOT—Executors—Gift of residue— Express trust—Advancements to children by testator – – – – **71**
See WILL. 4.

—— Interest, Rate of — Share of residue — Advances in testator's lifetime – **61**
See WILL. 1.

HOTCHPOT—*continued.*

—— Shares of residue—Advances in lifetime of testator — Subsequent authorized advances by trustees – – **828**
See WILL. 10.

HUSBAND AND WIFE— *Married Woman—Real Estate—Mortgage—Separate Examination—Acknowledgment—Burgage Tenure—Custom—Reasonableness—Fines and Recoveries Act*, 1833 (3 & 4 *Will.* 4, *c.* 74), *s.* 77.

Action by a married woman to set aside a mortgage of her real estate on the ground that it had been executed by her husband and herself without having been acknowledged by her. The defendants alleged that the property was held on burgage tenure, and that a local custom existed under which real estate so held by a married woman could be disposed of by her with the consent of her husband without her separate examination and acknowledgment :—

Held, that such a custom was inconsistent with the general principle of the common law that an exercise of free will was essential to alienations and contracts, and that a married woman was not in a position to exercise that free will; that the custom was therefore unreasonable and bad; and that the mortgage was void and did not operate to pass the plaintiff's interest in her land. JOHNSON *v.* CLARK
Parker J. 303

2. —— *Married Woman — Restraint on Anticipation — Annuity — Release by Married Woman—Covenant not to Sue—Acquiescence—Action by Administrator for Arrears of Annuity — Damages for Breach of Married Woman's Covenant — Direction in Will to pay Debts—Assets—Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 1.

A direction in the will of a married woman that her debts shall be paid makes all the property she has power to dispose of, including arrears of an annuity which was subject to a restraint on anticipation, assets for payment of all liabilities of her separate estate, including damages for breach of covenant by her legal personal representatives.

By a separation deed the husband covenanted to pay 1000*l.* to a trustee upon trust to pay the income thereof to the wife for her separate use without power of anticipation, and to pay him a further annual sum upon the same trusts. Afterwards the husband sued for a divorce. The proceedings were compromised by a deed whereby the wife and the trustee purported to release the husband from his covenant to pay the further annual sum, and she and a surety covenanted with the husband that neither she nor any person on her behalf should take proceedings to compel the husband to allow her any support, maintenance, alimony, or additional income other than the income of the 1000*l.* The wife lived ten years after this deed, and on every quarter-day she received from the trustee a cheque for 10*l.*, representing the income of 1000*l.*, and made no claim for more. The 1000*l.* was not in fact invested, and the 10*l.* a quarter was found by the husband.

HUSBAND AND WIFE—*continued.*

The wife made a will whereby she directed all her debts to be paid, and gave her property to an adopted daughter for life. Her legal personal representative brought this action against the husband for arrears of the annuity. The husband counter-claimed for damages for breach of the wife's covenant :—

Held that, the release of the husband's covenant being admittedly void, the conduct of the wife, in accepting the trustee's cheques for less sums than were due, did not amount either to accord and satisfaction, or to such acquiescence as would prevent the wife claiming the arrears. Her representative was therefore entitled to succeed in the action.

Held, also, that the wife's covenant not to sue was not personal to herself or confined to her lifetime; that it bound all her free separate estate; and that the direction in her will for payment of debts made the arrears of the annuity assets for payment of damages for breach of her covenant.

The husband was therefore entitled to recover back on the counter-claim all the money and costs which he might be ordered to pay in the action. No order was made except that the plaintiff should pay the costs of the action and of the counter-claim. SPRANGE *v.* LEE
Neville J. 424

—— Settlement.
See under SETTLEMENT.

INDEMNITY— Bank of England—Transfer of stock—Indemnity of Bank—Form of order – – – – – **290**
See BANK OF ENGLAND.

—— Third party notice by landlord for indemnity—Practice—Action by tenant **697**
See LANDLORD AND TENANT. 4.

INFANT— Conversion — Real estate — Sale by order of Court for costs—Surplus proceeds—Reconversion – – – **880**
See CONVERSION.

—— Will — Legacy — Interest — Bequest of income to legatee subject to obligation of maintaining infants – – **379**
See INTEREST.

INFRINGEMENT—Copyright.
See under COPYRIGHT.

INJUNCTION — Company — Unpaid calls — Notice to forfeit shares—Interim injunction restraining forfeiture – – **845**
See COMPANY. 1.

—— Copyright.
See under COPYRIGHT.

—— Municipal corporation—Council meetings Right of public to attend—Burgess—Newspaper reporter—Right to exclude
See CORPORATION. **457**

INSURANCE (FIRE)—*Settled Land—House in Devonshire — Settled Chattels — Infant Life*

INSURANCE (FIRE)—*continued.*

Tenant—Insurances by Trustees under Statutory Powers—Premiums paid out of Income—Rebuilding after Fire — Title to and Application of Policy Moneys — Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 42—*Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 18—*Fires Prevention (Metropolis) Act*, 1774 (14 Geo. 3, *c.* 78), *s.* 83.

During the minority of a life tenant of settled estates in Devonshire, the trustees, acting under the powers of the Conveyancing and Law of Property Act, 1881, s. 42, and the Trustee Act, 1893, s. 18, insured (*a*) the mansion-house and (*b*) certain settled chattels and furniture against fire. The policies were taken out in the names of the trustees, and the premiums were paid out of income. The house and chattels were for the most part destroyed by fire, and the trustees recovered 7000*l.* on the house policy and 1244*l.* on the chattel policy.

The trustees, the infant life tenant (aged twenty), and the remaindermen all desired the house to be rebuilt and refurnished, but the infant life tenant, who was not bound to insure, claimed that, as the premiums had been paid out of his income, the policy moneys in the hands of the trustees were his, and that he was entitled to a charge for any amount expended.

The remaindermen appeared, but took no part in the argument :—

Held, that under the Fires Prevention (Metropolis) Act, 1774, s. 83, the remaindermen were entitled to have the 7000*l.* recovered on the house policy applied in rebuilding, and that the infant life tenant was not entitled to a charge.

But *held*, that the infant life tenant was entitled to the 1244*l.* recovered on the chattel policy, to which the Fires Prevention (Metropolis) Act, 1774, s. 83, did not apply.

Seymour v. *Vernon*, (1852) 16 Jur. 189 ; *Warwicker* v. *Bretnall*, (1882) 23 Ch. D. 1888 ; and *Gaussen* v. *Whatman*, (1905) 93 L. T. 101, distinguished on the first point and (*semble*) followed on the second point. *In re* QUICKE'S TRUSTS. POLTIMORE *v.* QUICKE – **Swinfen Eady J. 887**

—— Heirlooms — Power of trustees to insure heirlooms and pay premiums out of income of capital moneys – – **821**
See SETTLED LAND. 1.

INTEREST—*Legacy—Will—Bequest of Income to Legatee subject to Obligation of maintaining Infants.*

A testator bequeathed the income of a trust legacy to his daughter-in-law during her widowhood, subject to the obligation of maintaining her deceased husband's children while minors and unmarried :—

Held, that the legacy did not carry interest from the testator's death.

Raven v. *White*, (1818) 1 Swans. 553, 559, followed.

Pett v. *Fellows*, (1733) 1 Swans. 561, n. ; *Leslie* v. *Leslie*, (1835) Ll. & G. t. Sugden, 1 ; and *In re Richards*, (1869) L. R. 8 Eq. 119, distinguished. *In re* CRANE. ADAMS *v.* CRANE
Swinfen Eady J. 379

INTEREST—*continued.*

—— Rate of interest—Will—Hotchpot—Share of residue—Advances in testator's lifetime. – – – – – **61**
See WILL. 1.

—— Trustee — Liability — Misappropriation — Restoration of capital with interest at 5 per cent. – – – – **522**
See TRUSTEE. 2.

INTERIM INJUNCTION.
See under INJUNCTION.

INTERNATIONAL COPYRIGHT.
See under COPYRIGHT.

INTESTACY—Real estate—Copyholds—Resulting trust—Descent—Customary or common law heir – – – – **655**
See WILL. 7.

INVESTMENTS—Range of investments authorized by instrument creating power of appointment—Extension of, by donee—Validity – – – – **410**
See POWER OF APPOINTMENT. 2.

—— Trustee — Liability — Misappropriation — Restoration of capital with interest at 5 per cent. – – – – **522**
See TRUSTEE. 2.

IRELAND – Settled land in Ireland — Wife entitled to life estate—Sale of land—Twelve per cent. bonus—Irish Land Acts – – – – – – **681**
See SETTLEMENT. 2.

JUDICATURE ACT—Bank of England—Transfer of stock — Indemnity of Bank — Form of order – – – – **290**
See BANK OF ENGLAND.

—— "Mutual dealings" — Set-off — Insolvent estate — Unsecured debts — Mortgages by testator– – – – – **804**
See ADMINISTRATION. 1.

JURISDICTION — *Foreign Property — Parties resident in England—Practice.*

As a general rule an English Court will not adjudicate on questions relating to the title to or the right to the possession of immovable property out of the jurisdiction of that Court ; and the exceptions to this rule depend on the existence between the parties to the suit in England of some personal obligation arising out of contract or implied contract, fiduciary relation, or fraud, or other conduct which in the view of an English Court of Equity would be unconscionable, and do not depend for their existence on the law of the locus of the immovable property.

In 1831 D. entered into a marriage contract with T. in France, both of them being domiciled French subjects. The plaintiff, the only son of this marriage, alleged that according to French law T. thereby became entitled to one half of the after-acquired property of D. and to a life interest in the other half of the property,

JURISDICTION—*continued.*

In 1836 D. went to India, and in 1839 went through a form of marriage with X., on whom and on others he by a settlement made in 1865 (of which the defendants were trustees) conferred interests in immovable property in Madras. D. died in 1885, and T. died in 1890. In 1893 an official in Madras (who was not a party to the English action mentioned below) took out letters of administration in India of the estate of T. which vested all her movable and immovable property in Madras in him. In 1907 the plaintiff took out letters of administration of the estate of T. in England. The plaintiff and the defendants being all in England, the plaintiff in an English action sought to impeach the settlement of 1865 as being contrary to the law of France and in contravention of his rights thereunder :—

Held, that the action ought not to be entertained.

In re Hawthorne, (1883) 23 Ch. D. 743, followed. DESCHAMPS *v.* MILLER **Parker J. 856**

—— Cause of action arising out of jurisdiction—Staying action—Abuse of process of Court - - - - - **471**
See PRACTICE.

LANDLORD AND TENANT — *Assignment — Lease—Covenant against Assignment without Consent unless unreasonably withheld—Covenant to reside upon the Premises and personally carry on Business of Licensed Victualler thereon—Assignment to Limited Company carrying on a Brewery Business—Demand for Increased Rent as Condition of Consent—Conveyancing and Law of Property Act*, 1892 (55 *&* 56 *Vict. c.* 13), *s.* 3.

By a lease of an hotel the lessee covenanted (1.) not to assign without the previous consent of the lessor, unless such consent should be unreasonably withheld ; (2.) at all times during the term to reside upon the hotel and personally carry on the business of a licensed victualler thereon. The lessee asked permission to assign to a limited company which carried on a brewery business. The lessor, being of opinion that an assignment to brewers would depreciate the goodwill, gave an unconditional consent to the assignment to a private person, but required as a condition of giving his consent to an assignment to a brewery firm that the rent should be increased and the term of the lease extended. In an action by the lessee for a declaration that the lessor was not entitled to impose such terms as a condition of giving his consent, Swinfen Eady J. (whose attention was not called to the covenant as to personal residence) held that the objection of the lessor was not in itself unreasonable, but that the lessor was acting contrary to s. 3 of the Conveyancing Act, 1892, in attempting to insist upon an increased rent as a condition of giving his consent, and he declared that the lessee was entitled to assign to the company without any further consent. The lessor appealed :—

Held, without expressing any opinion upon either of the points decided by the Court below, [1907] 2 Ch. 229, that, having regard to the covenant as to personal residence, the lease could not be assigned to a limited company. JENKINS *v.* PRICE - - - - - **C. A. 10**

LANDLORD AND TENANT—*continued.*

2. —— *Fixtures—Tenant's Covenant to deliver up demised Premises with Fixtures—Surrender and Creation of New Tenancy.*

A lease of houses made in 1851 for a term of seventy years contained a lessee's covenant at the expiration or determination of the term to deliver up the demised premises "with all and singular the fixtures and articles belonging thereto."

In 1907 the lease was vested in A., and the premises were occupied and used as a common lodging-house by W., who held as a weekly tenant from A.

In June, 1907, the lessors served on A. a notice to repair the premises, and A. in writing made an offer to surrender the premises at once and to pay 100*l.* towards the repairs, and this offer was accepted by the lessors. W., who had affixed to the premises things alleged to be tenant's or trade fixtures, was aware of what was going on, but the lessors did not know of his sub-tenancy until July 1, 1907. The lessors and A. wished to get rid of the sub-tenancy and W. knew that this was their intention, and early in August A. gave, and W. accepted, a notice to quit on August 19.

By an agreement in writing dated August 7 between the lessors and W., the latter became the weekly tenant of the lessors as from August 12, but no agreement was entered into with reference to W.'s fixtures.

By a surrender by deed executed on August 9 (but dated August 6 so as to make it precede the agreement with W.) A., as beneficial owner, surrendered and assigned the demised premises to the lessors, "to the intent that the residue . . . . unexpired of the term of years" therein might merge and be extinguished in the freehold and inheritance.

On September 12, 1907, the lessors served W. with a notice to quit on September 23 :—

Held—(1.) that the lessee's covenant to deliver was binding on W., and was not confined to landlord's fixtures, but extended to tenant's and trade fixtures ; (2.) that an agreement to surrender precluded the lessee from removing fixtures then upon the demised premises, although they were tenant's or trade fixtures, but would not affect his sub-tenant's right of removal without the consent of the latter, although the exercise of that right might make the lessee unable to complete his contract with the lessor ; (3.) that a contract to surrender a lease was a contract to surrender in possession free from sub-tenancies ; (4.) that if W. consented to the surrender, his tenancy was thereby surrendered and his right to remove fixtures was gone ; (5.) that if W. did not consent to the surrender, he was between August 9 and 12 the tenant of the lessors under the sub-tenancy granted by A., and even a rightful removal during this period by W. would have been a breach of the covenants for title implied by A.'s surrender ; but (6.) that by accepting the tenancy commencing on August 12 W. surrendered such tenancy as he already had and with it any right to remove fixtures.

LANDLORD AND TENANT—*continued.*

Semble, that if a tenant, on surrendering his lease in order that a new lease be granted, makes no stipulation to the contrary, he loses his right to remove fixtures, inasmuch as the surrender prima facie includes fixtures, and the subject of the new lease is prima facie what is surrendered in order to be re-demised; although in exceptional cases a termor remaining in possession after the expiration of his term under circumstances shewing that there is merely a prolongation of the term is allowed to remove fixtures after the term is ended. LESCHALLAS *v.* WOOLF **Parker J. 641**

3. —— *Mining Lease—Proviso for Re-entry—Breach of Covenant—Forfeiture — Notice determining Lease—No Re-entry—Issue of Writ containing inconsistent Claims — Unequivocal Demand for Possession.*

A lease of iron ore mine granted in 1900 contained covenants by the lessees to work the mine properly, not to do any act which might occasion loss or damage to the mine, to keep correct maps and plans, and to allow inspection by the lessor and his agents of such maps and plans. It also contained a covenant by the lessees to permit the lessor and his agents at all reasonable times to inspect the mine and its workings, and a proviso that on default by the lessees in performing or observing any of the covenants, the lessor might re-enter, and thereupon the lease should be determined. The lessor died in January, 1907. On April 26 his executors' agent was refused inspection of the mine by the lessees. On April 29 the executors gave the lessees notice in writing that they had determined the lease, and on May 3 they, through their agents, demanded possession of the mine. On May 4 they issued a writ against the lessees, claiming—(1.) recovery of possession of the mine; (2.) mesne profits; (3.) an injunction to restrain the lessees from working the mine so as to occasion loss or damage to it; (4.) an order on the lessees to allow inspection of the mine and its workings; (5.) a receiver; and (6.) damages:—

Held that, having regard to the form of the proviso for re-entry in the lease, actual re-entry or its equivalent, the issue of a writ claiming possession simpliciter, was necessary in order to determine the lease, and that the notices of April 29 and May 3 were ineffectual for that purpose.

Dicta of Bayley J. in *Fenn* v. *Smart*, (1810) 12 East, 444, 448, and Parke B. in *Jones* v. *Carter*, (1846) 15 M. & W. 718, 725, followed.

Held, also, that the claim in the writ for possession was inconsistent with the claim for an injunction, and that the writ was not therefore an unequivocal demand for possession so as to operate as a final election by the executors to determine the lease.

Evans v. *Davis*, (1878) 10 Ch. D. 747, followed. MOORE *v.* ULLCOATS MINING COMPANY, LIMITED – – **Warrington J. 575**

4. ——*Quiet Enjoyment—Implied Contract—Extent—Agreement to "let"—Disturbance—Persons claiming through Landlord — Prior Mining Lessees—Covenant with Landlord's Trustees to indemnify Landlord—Disturbance induced by Landlord—Derogation from Grant—Action by Tenant—Third Party Notice by Landlord for Indemnity—Rules of the Supreme Court*, 1883, *Order XVI., r.* 48.

By an agreement of August 15, 1895, Joseph Paget, the owner of Stuffynwood Hall, Derby, and the owners of adjoining property agreed to let the underlying minerals to a mining company, together with the usual powers of working.

The agreement, construed by the light of *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, 313, did not empower the company to let down the surface, and such a power was not a usual clause in the district.

Joseph Paget died in 1896, having appointed the defendant and others his executors and trustees, and having devised his real estate to the use of his trustees in trust for the defendant, his wife, for life.

On December 31, 1901, the Paget trustees (including the defendant) and the adjoining owners carried out the agreement of 1895 by two contemporaneous leases, namely, (*a*) a trust lease for a long term granted by the Paget trustees and the adjoining owners to certain "demising trustees" on trust to grant a specified mining lease to the company; (*b*) the mining lease by the demising trustees to the company.

The mining lease empowered the company to let down the surface, but there was a provision that, in case serious damage by subsidence was reasonably anticipated, the company might, without paying for the same, leave sufficient coal as should be agreed upon by the demising trustees for support.

The company covenanted with the demising trustees to indemnify the owners against damage caused by their workings, and to indemnify the owners and the demising trustees against actions in respect of damage arising from the exercise of their powers.

By a tenancy agreement of December 31, 1904, the defendant "agrees to let" Stuffynwood Hall to the plaintiff. She excepted and reserved the minerals with full power to work them, but she did not reserve power to let down the surface, nor was the agreement made subject to the trust and mining leases.

Serious damage to Stuffynwood Hall being subsequently anticipated, the defendant influenced the demising trustees to refuse to agree to any coal being left for support without payment.

The coal was therefore worked, subsidence resulted, and the plaintiff suffered serious consequential damage.

The plaintiff sued the defendant for damages for derogation from her grant and for breach of the contract for quiet enjoyment implied by the word "let." The defendant, who denied the derogation, and said that no contract was implied, claimed indemnity against the company by third party notice under Order XVI., r. 48:—

LANDLORD AND TENANT—*continued.*

Held, that the plaintiff was entitled to damages on both the above grounds, as—

(*a*) The defendant's conduct amounted to derogation from her grant;

(*b*) A contract for quiet enjoyment without interruption by the defendant, or any one claiming through her, was implied by the word "let";

(*c*) The company claimed through the defendant and the other Paget trustees, and not merely through their testator.

Hurd v. *Fletcher*, (1778) 1 Doug. 43, applied.

Held, also, that the company's covenant for indemnity did not extend to a liability arising directly from the defendant's conduct, and that in any case the defendant, not being a covenantee, could not enforce the indemnity by third party notice.

Review of the authorities on "implied contract for quiet enjoyment" from *Hart* v. *Windsor*, (1843) 12 M. & W. 68, to *Jones* v. *Lavington*, [1903] 1 K. B. 253.

Semble, prior to *Jones* v. *Lavington*, [1903] 1 K. B. 253, the implied contract, though limited in duration by the lessor's estate, extended to a lawful interruption by title paramount during the continuance of that estate.

Baynes & Co. v. *Lloyd & Sons*, [1895] 1 Q. B. 820, 826; [1895] 2 Q. B. 610, 615, 616, explained. MARKHAM *v.* PAGET - **Swinfen Eady J. 697**

LANDS CLAUSES ACTS—*Costs—Sale of Copyholds—No Tenant on Court Rolls—"Outstanding Interest"—Fine on Heir's Admission—Steward's Fees—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 82, 83.

Trustees of a will agreed to sell a strip of the sub-soil under three copyhold houses to the London County Council, who by the contract were to pay "the vendor's costs of title and conveyance as allowed by the Lands Clauses Consolidation Act, 1845." On investigating the title it was discovered that there had been no surrender or admission since April, 1870; the vendors, at the request of the council, obtained the admission of the customary co-heirs of the last surviving tenant on the court rolls, a former trustee:—

Held, that the steward's fees and the costs of admittance of the co-heirs must be borne by the council under s. 82;

And *held*, also, by Cozens-Hardy M.R. and Fletcher Moulton L.J. (Buckley L.J. expressing no opinion on this point as the respondents had elected not to argue it), that the lord's fine on admission was not payable by the council.

In re London United Tramways Act, 1900, [1906] 1 Ch. 534, overruled on this point.

In re Bear Island Defence Works and Doyle, [1903] 1 I. R. 164, queried as to the "death duties" there allowed. *In re* THAMES TUNNEL (ROTHERHITHE AND RATCLIFF) ACT, 1900. **C. A. 493**

LEASE—Landlord and tenant.
See under LANDLORD AND TENANT.

LEASES—Costs—Vendor and purchaser — Scale fee—Deducing one title on several contracts - - - - - **452**
See SOLICITOR. 3.

LEGACY—Will—Construction.
See under WILL.

"LET"—Quiet enjoyment—Implied contract—Extent - - - - - **697**
See LANDLORD AND TENANT. 4.

LIEN — Bankruptcy—Secured creditors—Proof—Shares in ships—Vendor's lien- **780**
See BANKRUPTCY.

LIGHT—*Access of Light—Easement—Prescription—Enjoyment—Twenty Years—Period before Action—"Consent or Agreement"—Tenant—Prescription Act*, 1832 (2 & 3 *Will.* 4, *c.* 71), *ss.* 3, 4.

Sects. 3 and 4 of the Prescription Act, 1832, must be read together, as explained by Lord Macnaghten in *Colls* v. *Home and Colonial Stores*, [1904] A. C. 172, at p. 189, with the result that a right to access of light is not absolute and indefeasible, even after twenty years' enjoyment, unless and until some action or suit is commenced in which this right is called in question; until that occurs the right remains inchoate.

In an action to restrain interference with light, the only material period to be considered is the period of twenty years prior to the issue of the writ.

It is competent for the tenant in occupation of the dominant tenement to give the "consent or agreement" mentioned in s. 3 (*semble*), though by doing so he may prejudicially affect the landlord's inchoate rights. Rights under s. 3 are acquired or lost by virtue of the acts or acquiescence of the occupier, and not by virtue of his title.

Tapling v. *Jones*, (1865) 11 H. L. C. 290, discussed and explained.

Simper v. *Foley*, (1862) 2 J. & H. 555, doubted.

Decision of Parker J., [1907] 2 Ch. 516, affirmed. HYMAN *v.* VAN DEN BERGH **C. A. 167**

LIMITATION ACT—Solicitor-mortgagee—Overcharges—Opening settled accounts **245**
See SOLICITOR. 1.

LIMITATIONS, STATUTE OF—*Mortgage—Real Estate subject to Trust for Conversion—Rents and Profits of unconverted Real Estate—Payment into Court by Trustees under Trustee Act*, 1893 — *Payment out—Mortgagee's Claim for Principal and Interest—Res judicata—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 34—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

A testator, who died in 1878, by his will gave the residue of his real and personal estate to trustees upon trust to convert at their discretion, and to divide the proceeds among his four children in equal shares. Part of the testator's residuary real estate consisted of an estate pur autre vie in a freehold house, which the trustees, in the exercise of their discretion, retained. In 1889 two of the children mortgaged their interests in this property and the proceeds thereof. More than twelve years later, viz., in 1905, the trustees paid into Court under the Trustee Act, 1893, certain sums representing the

LIMITATIONS, STATUTE OF—*continued.*

shares of the mortgagors in the rents and profits of this property. Up to this time no steps had been taken to enforce the mortgage, nor had any part of the principal or interest ever been paid, nor had any acknowledgment been given. Subsequently in 1905 the mortgagees applied for payment out of the fund in Court to them and other incumbrancers of the mortgagors in order of priority; but this summons was dismissed, and no appeal was brought from that dismissal. The mortgagors then applied for payment out of the fund to them:—

Held, that the mortgagors were entitled to have the fund paid out to them without satisfying the mortgage debt, inasmuch as (1.) the mortgagees were precluded by the dismissal of their summons from asserting any claim against the fund; (2.) the effect of s. 34 of the Real Property Limitation Act, 1833, was to extinguish their title to the mortgage.

In re Lloyd, [1903] 1 Ch. 385, explained and distinguished.

Decision of Warrington J., [1907] 1 Ch. 686, reversed. *In re* HAZELDINE'S TRUSTS **C. A. 34**

LIQUIDATOR—Company—Winding-up—Voluntary liquidator—Removal of—Practice *See* COMPANY. 12. **589**

LOCAL GOVERNMENT—Rates, Arrears of—Rural authority — Construction of sewers — "Special expenses" — Contributory area—Retrospective rate **222**
See RATES.

—— Water supply—Pontypridd Waterworks—Special Act—Action by urban authority to enforce—Joinder of Attorney-General—Necessity for - - - - **388**
See WATER.

LONDON—*Building not of uniform Height*—"*Height*"—"*Front or nearest external Wall*"—*Width of Street — Method of Measurement*—*London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 5, *sub-ss.* 15, 21; *s.* 49.

In determining whether a building which is not of uniform height contravenes the provisions contained in s. 49 of the London Building Act, 1894, regulating the height of the buildings, it is a question of fact in each case whether the building under consideration should be treated as a whole, or whether it may be regarded as several distinct buildings, the height of which may be measured according to different standards.

The question what constitutes "the front or nearest external wall" of a building within the section is also a question of fact to be dealt with in each case.

Where a portion of a building is set back from the general line of frontage it does not necessarily follow that that portion must be treated as a separate building entitled to have its height measured according to a different standard from that applied to the building regarded as a whole.

It is not possible, without contravening the provisions of s. 49, to erect a building in steps or terraces with a series of front walls running

LONDON—*continued.*

up one behind the other to a height exceeding that which is permissible for the front wall of that portion of the building which abuts upon the street.

Decision of Kekewich J., [1907] 2 Ch. 23, reversed. ATTORNEY-GENERAL *v.* METCALF & GREIG - - - - - **C. A. 327**

2. —— *Streets—Tramway—Footway—Dedication to Public—Road Authority—Powers—Widening of Roadway—Narrowing of Footway—Delegation of Statutory Powers*—57 *Geo.* 3, *c. xxix.* (*Michael Angelo Taylor's Act*), *s.* 52.

In 1883 building land in the Metropolis was demised to C. for a term of eighty-two years, and L., under an agreement with C., built several shops on a part of the land which fronted a highway. The shops were not built to the edge of the demised land, but a strip of land three feet wide was left between the front wall of the shops and the public footway. Subsequently in 1883 L. applied to the local authority to pave the footway in front of his shops right up to the building line, and the local authority informed him that on the slip of land being given up to form part of the public footway the footway would be paved. L. made no reply, and the footway was paved up to the wall of the shops. In the meantime C., who had no knowledge of L.'s application to the local authority, had granted L. separate underleases of the shops for eighty years, and had also assigned to him for value the head lease with a proviso against merger. In 1898 C. repurchased the head lease for value from L.'s successors in title. In 1906 the London County Council under the powers of a special Act converted a horse tramway in the highway in question into an electric tramway, and in connection with this work they widened the road and reduced the width of the footway and took up the pavement (including the pavement of the three-foot strip of land) in front of the shops. This work was done under an agreement made in May, 1906, with the borough council, whereby the borough council, in consideration of the reconstruction of the tramway, consented to the narrowing of the footway and agreed to pay part of the cost of paving, which was to be done by the county council. C. and the assignees of some of the underleases then brought this action against the London County Council for an injunction and damages in respect of (1.) the taking up of the pavement of the strip of land; (2.) the reduction of the width of the footway. In answer to the first claim the defendants alleged that the strip of land had been dedicated to the public by L. in 1883 and was part of the public footway, and in answer to the second that the borough council had power to authorize the defendants to make the reduction in the width of the footway, and that the work was done by the defendants under the authority of the borough council given by the agreement of May, 1906:—

Held, first (affirming the decision of Neville J., [1907] 1 Ch. 704), on the evidence, that, whatever claim the local authority might have had against L., the plaintiffs were purchasers for

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value without notice of any claim for dedication, and were entitled to relief in respect of trespass; secondly (reversing the decision of Neville J.), that s. 52 of Michael Angelo Taylor's Act empowered the borough council, as the road authority, to alter the division of the roadway into footway and carriageway, that they must be taken by their agreement to have authorized the defendants to execute these alterations on their behalf, and that this was not a delegation of their statutory powers; consequently that in respect of the narrowing of the footway the plaintiffs' claim failed. CORSELLIS *v.* LONDON COUNTY COUNCIL - - - - **C. A. 13**

—— Insurance (Fire)—Fires Prevention (Metropolis) Act, 1774 — Settled land — Rebuilding after fire — Title to and application of policy moneys - **887**
See INSURANCE (FIRE).

LUNACY—*Action by Lunatic—Parties—Committee of Estate—Inquisition—Special Finding—Incapable of managing Affairs — Capable of managing himself—Lunacy Act*, 1890 (53 *&* 54 *Vict. c.* 5), *s.* 98, *sub-s.* 2; *s.* 108, *sub-s.* 3—*Rules of the Supreme Court*, 1883, *Order XVI., r.* 17.

Where a lunatic so found by inquisition sues by the committee of his estate under Order XVI., r. 17, the committee must be a co-plaintiff.

Farnham v. *Milward & Co.*, [1895] 2 Ch. 730, 735, followed.

A special finding under s. 98, sub-s. 2, of the Lunacy Act, 1890, that the alleged lunatic, the subject of the inquisition, "is of unsound mind, so as to be incapable of managing his affairs, but that he is capable of managing himself, and is not dangerous to himself or to others," constitutes him a lunatic so found by inquisition within the above practice. *In re* LORD TOWNSHEND'S SETTLEMENT. LORD TOWNSHEND *v.* ROBINS - - - **Swinfen Eady J. 201**

—— Sale by trustees—Power of sale—Consent of tenant for life—Lunatic not so found—Quasi committee - - - **110**
See SETTLED LAND. 5.

MANDAMUS—Rates, Arrears of—Retrospective rate—Judicial discretion - - **222**
See RATES.

MANSION-HOUSE—Two settled estates—Principal mansion-house on each—Cesser
See SETTLED LAND. 6. **593**

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MASTER AND SERVANT—*Contract of Service — Repudiation — Wrongful Dismissal — Undertaking by Servant not to trade within certain Limits—Breach—Right of Master to sue.*

Where a contract of service provides that the servant shall hold office subject to termination on notice for a given period, and the servant is wrongfully discharged without notice, he may elect to treat the contract as completely at an end, retaining his right to bring an action for

MASTER AND SERVANT—*continued.*

the breach, and is no longer bound by a clause in the contract restrictive of his right to trade on the termination of his engagement. GENERAL BILLPOSTING COMPANY, LIMITED *v.* ATKINSON **C. A. 537**

MEETINGS—Company—General meeting—New regulations—Special resolution—Notice —Sufficiency - - - - **84**
See COMPANY. 9.

—— Municipal corporation—Council meetings —Right of public to attend—Burgess—Newspaper reporter—Right to exclude —Injunction - - - - **457**
See CORPORATION.

MEMORANDUM AND ARTICLES OF ASSOCIATION—Company.
See under COMPANY.

MERGER — Mortgage — Building society — Statutory receipt—Successive incumbrancers—Priority - - - **866**
See MORTGAGE. 1.

METROPOLIS.
See under LONDON.

MINES—Landlord and tenant—Quiet enjoyment — Implied contract — Extent — Disturbance—Prior mining lessees—Indemnity - - - - **697**
See LANDLORD AND TENANT. 4.

—— Mining lease—Proviso for re-entry—Breach of covenant—Forfeiture—Unequivocal demand for possession - - **575**
See LANDLORD AND TENANT. 3.

MISAPPROPRIATION — Trustee — Liability — Restoration of capital with interest at 5 per cent. - - - - **522**
See TRUSTEE. 2.

MISREPRESENTATION — Deed — Misrepresentation as to contents—Plea of non est factum - - - - - **1**
See DEED.

MISTAKE—Presumption of — Will—Construction—Residue - - - - **372**
See WILL. 9.

MORTGAGE — *Building Society — Statutory Receipt—Successive Incumbrancers—Priority—Right to call for Legal Estate — Equitable Charge with Undertakiny to give Legal Mortgage —Equitable Transferees — Merger — Building Societies Act*, 1874 (37 *&* 38 *Vict. c.* 42), *s.* 42.

In 1902 D., a solicitor, gave a mortgage in fee simple of certain property to a building society to secure 1650*l.* In June, 1905, D. arranged with a bank to pay off the mortgage, and on June 23, 1905, the society's solicitors wrote that the society would indorse the statutory receipt when the money was paid, and that the bank would pay the money to the society's account, and would take all the deeds except the society's

MORTGAGE—*continued.*

mortgage. On June 26, 1905, the bank paid the money to D.'s account; D. immediately drew a cheque for the amount which was credited to the society; the society handed to the bank's solicitors all the deeds (except the mortgage) and an undertaking to indorse the statutory receipt; and D. gave the bank an equitable charge on the property comprised in the deed, including the mortgage (described as being already indorsed with the statutory receipt) to secure 1600*l.*, the charge containing an undertaking to execute a legal mortgage if and when required. Shortly afterwards the society handed the mortgage, with the statutory receipt indorsed on it, to the bank's solicitors:—

Held, that the undertaking to give a legal mortgage did not amount to a contract that the legal estate should vest in D., and that the effect of the statutory receipt was to vest the legal estate in the bank.

In November, 1905, D., by shewing L. what purported to be a conveyance of the same property to D., but which was a forgery, induced L. to lend him 850*l.* and gave L. (who had no notice of the bank's mortgage) what purported to be a mortgage in fee of the same property to secure that amount.

In December, 1906, D. arranged that the plaintiffs should pay off the bank; and they did so, receiving the deeds and the bank's security (indorsed with a statement that all claims thereunder had been satisfied), and D. gave the plaintiffs (who had no notice of L.'s mortgage) what purported to be a legal mortgage for the amount paid:—

Held, that the plaintiffs' mortgage had priority over that of L. CROSBIE-HILL *v.* SAYER – – – – – **Parker J. 866**

2. —— *Stock Exchange—Pledge of Shares by Broker with Jobber against Settling Day—Outside Principal—Default in payment of Loan—Transaction closed under Stock Exchange Rules—Subsequent sale of Shares—Liability of Jobber to account as Mortgagee.*

Brokers on the Stock Exchange, acting for an undisclosed outside principal, pledged share certificates with a jobber on the exchange as security for a loan to be repaid the next settling day. The outside principal failed to put the brokers in funds to repay the loan, whereby the brokers made default and were hammered, and the jobber, under the rules of the Stock Exchange, was obliged to take over the shares at the official price of the day. Afterwards the shares rose in the market, and the jobber sold them at a profit, and was then sued by the outside principal for an account of the proceeds of sale on the footing that he was only mortgagee of the shares:—

Held, that the relation of mortgagor and mortgagee existed between the outside principal and the jobber; that the Stock Exchange Rules did not apply as between them; and that the jobber was bound to account and, after deducting his principal, interest and costs, to pay over the surplus proceeds of sale to the mortgagor. PONSOLLE *v.* WEBBER – – – **Neville J. 254**

MORTGAGE—*continued.*

—— Accounts, Opening settled—Solicitor-mortgagee—Overcharges—Limitation Act *See* SOLICITOR. 1. **245**

—— Administration action—Insolvent estate—Unsecured debts—Mortgages by testator—Surplus proceeds of sale of mortgaged property – – – – – **804** *See* ADMINISTRATION. 1.

—— Copyholds—Title—Conditional surrender by way of mortgage—Principal and interest statute-barred—Conditions of sale – – – – – – **853** *See* VENDOR AND PURCHASER.

—— Married woman—Separate examination—Acknowledgment—Burgage tenure—Custom—Reasonableness—Fines and recoveries – – – – – **303** *See* HUSBAND AND WIFE. 1.

—— Real estate subject to trust for conversion—Mortgagee's claim for principal and interest – – – – – **34** *See* LIMITATIONS, STATUTE OF.

—— Receiver—Partition action—Sale by mortgagee—Purchase by receiver without leave of the Court – – – **546** *See* RECEIVER.

—— Settled land—Sale by the tenant—Mortgagee of life estate—Consent—Concurrence in conveyance – – – **213** *See* SETTLED LAND. 4.

—— Settled mortgage—Apportionment pending realization—Arrears due at date of settlement – – – – **115** *See* SETTLED LAND. 1.

—— Will—Mortgage—Land subject to incumbrances—Option of purchase—Real Estate Charges Act, 1854 – – **839** *See* WILL. 8.

MUNICIPAL CORPORATION.
See under CORPORATION.

MUSIC—Copyright (musical compositions)—International copyright—Injunction *See* COPYRIGHT. 2. **443**

NATIONAL DEBT.
See under BANK OF ENGLAND.

NAVAL OR MILITARY SERVICES—Entering—Will—Condition—Forfeiture—Invalidity—Public policy – – **383** *See* WILL. 3.

NEWSPAPER REPORTER—Right to exclude—Municipal corporation—Council meetings—Right of public to attend—Burgess—Injunction – – – **457** *See* CORPORATION.

NEXT OF KIN—Executors—No next of kin—Residue undisposed of—Beneficial title of executors – – – – **552** *See* WILL. 5.

NOTICE—Third party notice by landlord for indemnity—Action by tenant—Practice *See* LANDLORD AND TENANT. 4. **697**

PARTIES—Lunatic, Action by—Committee of estate—Inquisition – – – **201** *See* LUNACY.

PARTITION ACTION—Sale by mortgagee—Purchase by receiver without leave of the Court – – – – – **546** *See* RECEIVER.

PARTY-WALL—Damage by smoke – – **630** *See* EASEMENT.

PATENT—*Petition for Revocation—Motion to amend Specification—Comptroller—Advertisements—Terms—Costs—Practice—Patents and Designs Act*, 1907 (7 *Edw.* 7, *c.* 29), *ss.* 22, 23, 92, *sub-s.* 2.

An application under s. 22 of the Patents and Designs Act, 1907, for leave to amend a specification does not fall within sub-s. 2 of s. 92 of the Act, and therefore does not require to be made to the patent judge.

Notice of an application under s. 22 of the Act must be given to the comptroller, and the proposed amendments must be advertised in the Official Journal, before the amendments are considered by the Court; and the comptroller will be entitled to his costs of appearing on the application.

When amendments are allowed it will, as a general rule, be a term of the order that no injunction shall be asked in any action brought for infringement of the patent in respect of articles made prior to the date of the order allowing the amendments, unless the patentee shall establish to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge.

In re Geipel's Patent, [1903] 2 Ch. 715, followed on this point. *In re* KLABER AND STEINBERG'S PATENT – – **Neville J. 847**

—— Designs—"Drawings"—Assignment of copyright to intended company—Validity—Registration – – **433** *See* COPYRIGHT. 1.

—— Trade mark—Registration—Descriptive name—Patented article – – **513** *See* TRADE MARK. 2.

PICTURES—Distress—Proprietary club—Pictures sent for exhibition and sale **49** *See* DISTRESS.

—— Unpublished picture—Common law right—Infringement—Pirated copy—Innocent publication—Damages – **567** *See* COPYRIGHT. 3.

PLEA—Deed—Misrepresentation as to contents—Plea of non est factum – – **1** *See* DEED.

PLEDGE—Stock Exchange—Pledge of shares by broker with jobber against settling day—Liability of jobber to account as mortgagee – – – – **254** *See* MORTGAGE. 2.

POLICY—Fire insurance. *See* under INSURANCE (FIRE).

PONTYPRIDD WATERWORKS—Water supply—Special Act—Provisions for protection of urban authority—Action by urban authority to enforce—Joinder of Attorney-General—Necessity for– **388** *See* WATER.

POSSESSION—Mining lease—Forfeiture—Issue of writ containing inconsistent claims—Unequivocal demand for possession *See* LANDLORD AND TENANT. 3. **575**

POWER—*Execution*—"*Writing or Writings*"—"*Appointment made by Will*"—*Testamentary Document not provable as Will—Validity—Wills Act*, 1837 (1 *Vict. c.* 26), *ss.* 1, 9, 10.

Mrs. Barnett assigned a policy of assurance on her own life to trustees by a settlement which contained a proviso that it should be lawful for her at any time during her life "by any deed or deeds writing or writings with or without power of revocation to be by her duly executed in the presence of two or more credible witnesses to revoke all any or either of the" provisions of the settlement, and to appoint other trusts in their place. She subsequently signed a document by which she did not in terms revoke any of the provisions of the settlement, but purported to make certain dispositions of (inter alia) the property the subject of the settlement in testamentary form. This document was signed by her in the presence of two credible witnesses, but, inasmuch as her signature was not placed at the foot or end thereof, it could not be admitted to probate as a will. The question now raised was whether the document operated as an exercise of the power of appointment:—

Held, that the document was a "writing in the nature of a will in exercise of a power" and therefore by s. 1 of the Wills Act, 1837, a "will" within the meaning of that statute; it was therefore an "appointment made by will" within the first sentence of s. 10, and, inasmuch as it was not executed as a will in accordance with s. 9, it was invalid as an execution of the power.

In re Broad, [1901] 2 Ch. 86, not followed. *In re* BARNETT. DAWES *v.* IXER. **Warrington J. 402**

POWER OF APPOINTMENT—*Appointment—Limited Power amongst Donee's Children—Exercisable by Will—Special Formalities—Trust Fund—Donee domiciled in Scotland—Power duly exercised by Will—Subsequent Disposition of Part of Fund—Holograph Codicil—Defective Execution—Codicil valid by Law of Domicil—Probate in England—Defective Execution aided—Pro tanto Revocation of Prior Appointment—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 10—*Wills Act*, 1861 (*Lord Kingsdown's Act*) (24 & 25 *Vict. c.* 114).

The testatrix, a domiciled Scotswoman, was the donee of a special power of appointment over a trust fund in favour of her children exercisable "by her last will and testament in

POWER OF APPOINTMENT—*continued.*

writing or any codicil or codicils thereto to be signed in the presence of and attested by two or more witnesses." She made a will, with the necessary formalities, duly exercising the power and appointing the whole fund to her three daughters. Subsequently, by the first of a series of holographic dispositions written from time to time, and under the last of which her unattested signature appeared, she referred to the fund and gave thereout 500*l.* to each of her sons therein named. One son afterwards died, and then by a later writing of the series she cancelled the gift of 500*l.* to him and gave it to her three daughters. The holograph writings were effective according to Scots law and were, with the will, admitted to confirmation in Scotland, and were also admitted to probate in England along with the will and as a codicil thereto:—

Held—(1.) that the domicil of the testatrix being Scottish, s. 10 of the Wills Act, 1837, which does not extend to Scotland, had no application; and that, quite independently of the provisions of Lord Kingsdown's Act, the codicil, having been recognized as a valid testamentary instrument by the Probate Division, was capable of operating as an execution of a power of appointment by will over personal estate:

In re Price, [1900] 1 Ch. 442, followed;

(2.) that, there being no express revocation of the appointment by will, the codicil only revoked the will to the extent to which the appointment in the codicil effectively interfered with the dispositions of the will:

Duguid v. *Fraser*, (1886) 31 Ch. D. 449, followed; and

(3.) that the Court would aid the defective execution in favour of the two surviving sons, who were consequently entitled to 500*l.* each out of the fund, the rest of which went to the three daughters:

Morse v. *Martin*, (1865) 34 Beav. 500, followed. *In re* WALKER. MACCOLL *v.* BRUCE. **Joyce J. 560**

2. —— *Partial exercise of Power of Appointment by Donee—Range of Investments authorized by Instrument creating Power—Extension of by Donee—Validity.*

Where the donee of a power of appointment does not appoint to objects of the power he cannot alter the range of investments authorized by the instrument creating the power.

A testator by his will gave all his real and personal estate to trustees upon trust to sell and convert and to invest the proceeds in certain investments which did not include mortgages of leaseholds, and he directed them to pay the income of the trust estate to his wife for life, and after her death to hold the trust estate upon trust for such of his nine children as his wife should by will or codicil appoint, and in default of appointment upon trust to divide the same among his nine children in equal shares. The testator's widow by her will, in exercise of the power given her by the testator's will, appointed certain sums to her daughters in respect of their one-ninth shares,

POWER OF APPOINTMENT—*continued.*

and declared that the trustees of the testator's will might invest the moneys subject to the trusts of that will in certain securities which were not within the range of investments thereby authorized, including mortgages of leaseholds. By a codicil to her will the widow, in further exercise of the power, declared that the trustees of the testator's will should hold two of the one-ninth shares of the trust estate upon trusts in favour of certain objects of the power, and, subject to a slight modification in the amounts of the sums appointed by her will, made by a second codicil, she allowed the bulk of the trust estate to pass under the testator's will in default of appointment. After her death the trustees of the testator's will invested part of the trust estate upon mortgage of certain leasehold premises:—

Held, that the trustees of the testator's will had no power to invest upon leasehold security funds representing shares subject to the trusts of the will passing in default of appointment. *In re* WILLIAM FALCONER'S TRUSTS. *In re* ANN FALCONER'S TRUSTS. PROPERTY AND ESTATES COMPANY, LIMITED *v.* FROST **Warrington J. 410**

—— Ireland, Settled land in—Wife entitled to life estate—Dissolution of marriage—Appointment to self—Bonus—Irish Land Acts – – – – **681**
See SETTLEMENT. 2.

—— Power—Execution—"Writing or writings"—"Appointment made by will"—Validity – – – – – **402**
See POWER.

POWERS—Settled land—Powers exercisable by trustees—Conflict of powers—Consent of tenant for life – – – **812**
See SETTLED LAND. 3.

—— Water company.
See under WATER COMPANY.

PRACTICE—*Staying Action—Abuse of Process of Court—Cause of Action arising out of Jurisdiction—Accessible Court where Cause of Action arose—Oppression—Injustice to Defendant.*

An action was commenced in England, in which the plaintiff, a married woman, claimed an account under a settlement made in India on the occasion of her marriage in 1897, and she further alleged a wilful default by the defendants, one of whom, the plaintiff's husband, had been appointed a trustee of the settlement by a subsequent deed, the other two being the original trustees of the settlement. The defendants were all domiciled in England, but were ordinarily resident in India, the plaintiff's husband being a barrister practising in Calcutta, and the other defendants holding appointments in the Indian Civil Service. The property comprised in the settlement was in India. From 1902 down to the commencement of the action the plaintiff was living in France apart from her husband. She then came to England, where, as she alleged, she intended thenceforth to reside permanently. The husband and another of the

PRACTICE—*continued.*

defendants were served with the writ during their temporary presence in England. They applied to stay all proceedings in the action on the ground that it was an abuse of the process of the Court.

The Court was of opinion on the evidence that the plaintiff had in fact brought the action in England instead of in India, not for any bona fide purpose, but in order to obtain an undue advantage over the defendants, and that the continuance of the proceedings in England would necessarily be productive of injustice to the defendants:—

Held, that in these circumstances the action ought to be stayed.

Egbert v. *Short*, [1907] 2 Ch. 205, approved. *In re* NORTON'S SETTLEMENT. NORTON *v.* NORTON - - - - - C. A. 471

—— Action, Cause of.
See under ACTION.

—— Administration.
See under ADMINISTRATION.

—— Jurisdiction — Foreign property — Parties resident in England - - - 856
See JURISDICTION.

—— Mining lease—Forfeiture—Issue of writ containing inconsistent claims—Unequivocal demand for possession- 575
See LANDLORD AND TENANT. 3.

—— Parties—Lunatic, Action by — Committee of estate—Inquisition- - - 201
See LUNACY.

—— Third party notice by landlord for indemnity—Action by tenant - - 697
See LANDLORD AND TENANT. 4.

PREMIUMS—Fire insurance.
See under INSURANCE (FIRE).

PRESCRIPTION—Fishery, Common of—Profit à prendre—Fluctuating body—Presumption of legal origin - 230, 243, n.
See FISHERY. 1, 2.

—— Light, Access of — Enjoyment — Twenty years—Period before action - 167
See LIGHT.

PRESUMPTION—Executors—No next of kin—Residue undisposed of—Beneficial title of executors—Equal pecuniary legacies to all—Unequal specific legacies to some—Presumption of intention - 552
See WILL. 5.

—— Fishery, Common of—Profit à prendre—Fluctuating body — Prescription — Presumption of legal origin - 230
See FISHERY. 1, 2.

—— Will—Construction—Residue — Presumption of mistake - - - - 372
See WILL. 9.

PRIORITY—Debenture — Floating security — Issue of further debentures — Specific charge - - - - - 604
See COMPANY.

—— Mortgage — Building society —Statutory receipt—Successive incumbrancers — Priority - - - - - 866
See MORTGAGE.

PROBATE—Appointment—Donee domiciled in Scotland — Power duly exercised by will — Holograph codicil—Probate in England — Defective execution aided
See POWER OF APPOINTMENT. 560

—— Trustee—Appointment of new trustees—Court of Probate Act - - - 180
See TRUSTEE. 1.

PROFIT À PRENDRE—Common of fishery—Fluctuating body — Prescription—Presumption of legal origin - 230, 243, n.
See FISHERY. 1, 2.

PROOF— Bankruptcy — Secured creditors — Lumping debts and securities—Debtor's right to redeem - - - - 780
See BANKRUPTCY.

PROTECTOR—Estate tail—Disentailing assurance—Three persons appointed by settlor—Death of two - - 26
See SETTLEMENT. 3.

PUBLIC HEALTH—Rates.
See under RATES.

PUBLIC POLICY—Will—Condition—Forfeiture—Entering naval or military services—Invalidity - - - - - 383
See WILL. 3.

PUBLICATION—Unpublished picture—Common law right—Infringement—Pirated copy — Innocent publication — Damages
See COPYRIGHT. 3. 567

PUMPING STATION — Erecting—Water Company—Powers —Sinking well — Ultra vires- - - - - - 727
See WATER COMPANY.

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

QUIET ENJOYMENT—Implied contract—Extent—Agreement to "let" - - 697
See LANDLORD AND TENANT. 4.

RATES—*Arrears of—Local Government—Rural Authority—Construction of Sewers—"Special Expenses"—Contributory Area—Judgment for Arrears of Rates—Retrospective Rate—Mandamus—Judicial Discretion—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 28, 229, 230.

Under three agreements made in 1900 between the plaintiffs and defendants certain sewers were constructed in three parishes within the defendants' district and were connected with

RATES—*continued.*

the plaintiffs' drainage system, and it was agreed that the defendants should pay the plaintiffs annually a rent calculated on the rateable value of all property in the three parishes which should be liable to contribute to the rates for special expenses under the Sanitary Acts, such rent to be paid quarterly. From April, 1901, to September, 1905, by a common mistake the defendants only paid annually a rent calculated on the rateable value of the houses in the three parishes actually connected with the plaintiffs' system instead of on the rateable value of all the property in those parishes liable to contribute to the rates for special expenses. The mistake was discovered in September, 1905, when negotiations ensued and the amount of the arrears was ascertained. The defendants, however, having no moneys available to pay the arrears, the plaintiffs in October, 1906, brought an action to recover the arrears, and for a mandamus to enforce the levy of a rate to satisfy the arrears :—

Held, that the plaintiffs were entitled to judgment for the amount of the arrears, but that, even if the debt could be said to accrue at the date of the judgment, the Court would not, in the exercise of its judicial discretion, order the levy of a rate which would throw upon the rates of one year an expense with which that year had no connection. A mandamus was therefore refused.

Reg. v. *Leigh Rural Council*, [1898] 1 Q. B. 836, discussed. CROYDON CORPORATION *v.* CROYDON RURAL DISTRICT COUNCIL.

Neville J. 222

REAL ESTATE CHARGES ACT, 1854—Will—Mortgage—Option to purchase—Devisee
See WILL. 8. **839**

REAL PROPERTY LIMITATION ACTS.
See under LIMITATIONS, STATUTE OF.

RECEIPT—Building Society—Statutory receipt—Mortgage—Successive incumbrancers—Priority - - - - - **866**
See MORTGAGE. 1.

RECEIVER—*Partition Action—Sale by Mortgagee—Purchase by Receiver without Leave of the Court.*

A receiver appointed by the Court cannot purchase the property of which he is receiver without the leave of the Court, even where the sale is made, not in the action in which he was appointed, but by a mortgagee selling with leave outside the action.

Alven v. *Bond*, (1841) Fl. & K. 196, approved.

Decision of Swinfen Eady J., [1907] 2 Ch. 292, affirmed. NUGENT *v.* NUGENT - **C. A. 546**

RECONSTRUCTION — Company — Contemporaneous resolutions for voluntary winding-up and reconstruction scheme — Invalidity of scheme - - - **765**
See COMPANY. 11.

RECONSTRUCTION—*continued.*

—— Company—Sale of undertaking to new Company—Distribution of consideration—Ultra vires - - - **743**
See COMPANY. 7.

RECONVERSION.
See under CONVERSION.

RECTIFICATION—Company—Register of members — Deceased member — Executors, whether to be described as such in register - - - - - **415**
See COMPANY. 8.

REDEMPTION—Bankruptcy — Proof — Secured creditors—Lumping debts and securities—Revesting—Debtor's right to redeem
See BANKRUPTCY **780**

RE-ENTRY—Proviso for—Mining lease—Breach of covenant—Forfeiture—Unequivocal demand for possession - - **575**
See LANDLORD AND TENANT. 3.

REGISTER—Company—Register of members—Rectification — Deceased member — Executors, whether to be described as such in register - - - - **415**
See COMPANY. 8.

REGISTRATION—Company—Debentures—Certificate of registrar—Conclusiveness of certificate - - - - **152**
See COMPANY. 3.

—— Company—Mortgage—Debenture stock—Covering deed—Substitution of other property - - - - - **279**
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SETTLED LAND—*Heirlooms—Capital Moneys subject to same Trusts—Insurance—Power of Trustees to insure Heirlooms and pay Premiums out of Income of Capital Moneys—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 18.

Chattels settled so as to devolve as heirlooms with settled land are "insurable property" within the meaning of sub-s. 1 of s. 18 of the Trustee Act, 1893.

Where under a settlement heirlooms are settled so as to devolve with the settled land, and the trustees have in their hands capital moneys subject to the same trusts, the trustees have power under s. 18 of the Trustee Act, 1893, to insure the heirlooms against loss by fire, and to pay the premiums for such insurance out of the income of the capital moneys in their hands. *In re* EARL OF EGMONT'S TRUSTS. LEFROY *v.* EARL OF EGMONT – – **Warrington J. 821**

SETTLED LAND—*continued.*

2. —— *Mortgage—Tenant for Life and Remainderman—Settled Mortgage—Settlor taking First Life Interest — Deficient Security—Life Tenant's Death—Subsequent Receipts in respect of past and accruing Income—Apportionment pending Realization—Arrears due at Date of Settlement.*

On December 10, 1884, a mortgage of 18,000*l.* on farm A was settled on successive trusts for two life tenants and a remainderman without making any provision for some three years' arrears of interest then owing to one settlor who became first life tenant thereunder. The first life tenant died on July 8, 1893, and the second life tenant on January 22, 1903.

From October 11, 1881, to October 11, 1902, the mortgagor had worked farm A together with farm B under an arrangement by which he was to pay the net incomes to the mortgagees of farm A and farm B respectively to the extent of the interest due to them.

The net incomes were not nearly sufficient to keep down the interest in either case, but owing to errors in the apportionment of working expenses during the joint working, the mortgagees of farm B had altogether been paid 1028*l.* in excess of the income properly attributable to their farm.

On August 11, 1905, the trustees recovered the 1028*l.*, representing income earned from October 11, 1881, to October 11, 1902, from the mortgagees of farm B.

From October 11, 1902, to October 11, 1906, the mortgagor continued to work farm A as manager to the trustees.

On October 11, 1906, the trustees let farm A at a rent of 515*l.*, and on November 29, 1906, they received 2368*l.* in respect of the sale of farm stock provided out of and representing income earned from October 11, 1881, to October 11, 1906.

The interest was now heavily in arrear, and the security was greatly depreciated.

Foreclosure proceedings had been commenced, but no order had yet been made :—

Held, that the first life tenant's representative could not as against the other beneficiaries claim any arrears of interest owing at the date of the settlement, but subject to this exception the two sums of 1028*l.* and 2368*l.*, and every sum of accruing rent received up to the time of foreclosure absolute, must be treated as a payment on account of all arrears of interest owing at the date of payment, and must be apportioned between the estates of the two life tenants and the remainderman in proportion to the amounts owing to them for arrears of interest at the date when the particular sum was received. *In re* BROADWOOD'S SETTLEMENTS. BROADWOOD *v.* BROADWOOD – – **Swinfen Eady J. 115**

3. —— *Powers exercisable by Trustees—Conflict of Powers—Consent of Tenant for Life—Compound Settlement—Private Act of Parliament conferring Powers but not creating Limitations—Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 2, *sub-s.* 1 ; *s.* 56, *sub-ss.* 1, 2.

Where land is by will vested in trustees in trust for persons by way of succession, a private

SETTLED LAND—*continued.*

Act of Parliament which merely confers upon the trustees powers of developing and managing the land as a building estate, but does not incorporate the will, nor itself create any limitations to or in trust for any persons by way of succession, is not part of "the settlement" within the meaning of s. 56, sub-s. 2, of the Settled Land Act, 1882 ; and no consent by the tenant for life to the exercise of those powers by the trustees is rendered necessary by that sub-section. TALBOT *v.* SCARISBRICK **Warrington J. 812**

4. —— *Sale by Life Tenant—Mortgagee of Life Estate—Consent—Concurrence in Conveyance—Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 20, *sub-s.* 2 ; *s.* 50.

Where a life tenant sells settled land under the powers of the Settled Land Acts, with the consent of the mortgagee of the life estate, the mortgagee's estate passes by the exercise of the statutory power, and his concurrence in the conveyance is not necessary.

Sects. 20 and 50 of the Settled Land Act, 1882, explained.

Dictum of North J. in *In re Sebright's Settled Estates*, (1886) 33 Ch. D. 429, 438, not followed.

Observations in *Cardigan* v. *Curzon-Howe*, (1888) 40 Ch. D. 338, 342 ; *In re Du Cane and Nettlefold's Contract*, [1898] 2 Ch. 96, 108 ; and *In re Mundy and Roper's Contract*, [1899] 1 Ch. 275, 289, explained and applied. *In re* DICKIN AND KELSALL'S CONTRACT **Swinfen Eady J. 213**

5. —— *Sale by Trustees—Power of Sale—Consent of Tenant for Life—Lunatic not so found—Quasi Committee—Consent "necessary in the character of trustee," or "as a check upon the undue exercise of the power"—Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 53 ; *s.* 56, *sub-s.* 2—*Lunacy Act*, 1890 (53 *&* 54 *Vict. c.* 5), *ss.* 116, 120, 128.

The consent of a tenant for life, who is a lunatic not so found, to the exercise by the trustees of settled land of a power of sale contained in the settlement cannot be given on his behalf by a quasi committee appointed under s. 116 of the Lunacy Act, 1890, such consent being neither "necessary in the character of a trustee," nor "as a check upon the undue exercise of the power," within s. 128 of the Act.

In re Baggs, [1894] 2 Ch. 416, n., followed. *In re* DE MOLEYNS' AND HARRIS'S CONTRACT **Joyce J. 110**

6. *Two Settled Estates—Principal Mansion-house on Each—Alteration in Character of One Estate — Development as Building Estate — Mansion-house converted into School—Less than Twenty-five Acres occupied with Mansion-house —No longer "principal Mansion-house"—Tenant for Life—Restriction on Powers—Cesser—Settled Land Act*, 1890 (53 *&* 54 *Vict. c.* 69), *s.* 10.

Two estates, the Bickley Park estate, in Kent, and the Copt Hall estate, in Essex, each having its own principal mansion-house, were settled by the same settlement upon the same trusts. The tenant for life had definitely adopted Copt Hall

SETTLED LAND—*continued.*

as his residence. The Bickley Park estate was a building estate, and its development as such, which had already commenced at the date of the settlement, was subsequently continued until the character of the surrounding neighbourhood had become altered to such an extent as to render a house of the size and pretensions of Bickley Hall quite out of place and very difficult to let. Ultimately, with the sanction of the Court, Bickley Hall and eighteen acres of pleasure grounds and park were let on a twenty-one years' lease to a schoolmaster, 2000*l.* being first expended out of capital moneys in making the hall suitable for the purposes of a school. The remainder of the pleasure grounds and park, which had originally comprised about 103 acres, was cut up and laid out under a building scheme and a considerable portion sold or let on building leases :—

Held that, in the circumstances, Bickley Hall had ceased to be the principal mansion-house on any settled land, and that the hall and the pleasure grounds and park and lands usually occupied therewith were no longer subject to the restrictions imposed by s. 10 of the Settled Land Act, 1890. *In re* WYTHES' SETTLED ESTATES **Eve J. 593**

—— Insurance—Rebuilding after fire—Title to and application of policy moneys— **887** *See* INSURANCE (FIRE).

SETTLEMENT — *After-acquired Property — Covenant to settle—Exception of Property settled on Wife for her Separate Use — Contingent Reversionary Interests not falling into Possession during Coverture.*

A settlement made in 1870, on the marriage of L. (the husband) and D. (the wife), contained a covenant by both of them with the trustees of the settlement that all other, if any, the present and future real and personal estate and effects whatsoever, whether in possession or expectancy, of or to which L. and D., or either of them in her right, or by marital right, should at any time or times during the coverture become seised, possessed, or entitled, or of or to which L., or any person claiming through or under him, should by any means whatsoever become, in her right or by marital right, at any time or times after solemnization of the marriage, seised, possessed, or entitled, except only such estate and effects as should be settled on her for her separate use, should from time to time, as soon as might be thereafter, or after they or he should become possessed of or entitled to the same, be conveyed, assigned, transferred or paid unto the trustees, and be settled and assured upon the trusts of the settlement, or such of them as should be subsisting and capable of taking effect.

D. in 1871 (during the coverture) became entitled under her mother's will to a contingent reversionary interest in part of the proceeds of sale of realty and personalty which was given for her separate use, and under a codicil to the same will to a contingent reversionary interest in another part of the proceeds, which was not given for her separate use. After L.'s death the interest under the will fell into possession ; the interest under the codicil was still reversionary :—

Held, following *Kane* v. *Kane*, (1880) 16 Ch. D. 207, that the interest under the will was not within the operation of the covenant.

Held, also, that the interest under the codicil was within the covenant.

Townshend v. *Harrowby*, (1858) 4 Jur. (N.S.) 353, and *In re Michell's Trusts*, (1878) 9 Ch. D. 5, considered.

Semble, that it always has been possible, whether before or after Malins' Act, by a properly framed covenant as to after-acquired property in a marriage settlement, to bind a married woman's reversionary interests, whether contingent or otherwise, acquired during coverture, but not falling into possession until afterwards ; and that the Court can and always could, notwithstanding technical difficulties as to getting an actual conveyance, bind the property in the hands of every one, including the heir or legal personal representative of the husband or wife, as the case may be. LLOYD *v.* PRICHARD **Parker J. 265**

2. —— *After-acquired Property — Post-nuptial and Voluntary Settlement — Wife's Covenant to settle Property acquired during existing Coverture—Previous Marriage Settlement — Settled Fund — Power of Appointment on failure of Issue—Reversionary Interest in default of Appointment—No Child—Dissolution of Marriage—Appointment to Self—Settled Land in Ireland—Wife entitled to Life Estate—Sale of Land—Twelve per Cent. Bonus—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48—*Irish Land Act*, 1904 (4 *Edw.* 7, *c.* 34), *ss.* 3, 4.

By a voluntary settlement dated March 26, 1902, the applicant, a married woman, covenanted to settle all real and personal property to which she was then, or should at any time during her then present coverture become, entitled for any estate or interest whatsoever in possession, reversion, remainder, contingency, or expectancy. There was no child of the marriage, which was dissolved on the wife's petition as from June 9, 1904, and the property of the wife comprised in her marriage settlement was ordered to be conveyed to her as if the husband had died in her lifetime.

In these circumstances questions arose whether the trustees of the voluntary settlement were entitled by virtue of the above-mentioned covenant to the following moneys, namely :—

(1.) A sum of 2800*l.*, which became payable on April 12, 1905, representing the applicant's fund settled by her marriage settlement, and at the date thereof neither ascertained nor payable, over which fund, in the event of there being no child of the marriage, the applicant had a general power of appointment exercisable by deed while not under coverture, or by will whether covert or sole, and to which fund in default of any such appointment she was absolutely entitled if she survived her husband. On December 4, 1905, the applicant had appointed the marriage settlement funds to herself absolutely.

(2.) A sum of 241*l.* 4*s.* arising upon the sale

SETTLEMENT—*continued.*

by the applicant, as tenant for life, of certain land in Ireland comprised in the voluntary settlement, sold by her, after the dissolution of her marriage, under the provisions of the Irish Land Act, 1903. The sum in question represented the 12 per cent. bonus payable to vendors under s. 48, sub-s. 1, of that Act, and by virtue of the provisions of the Irish Land Act, 1904, belonged to the applicant, as tenant for life, as her "own proper moneys for" her "own use and benefit."

On the first question:—*Held*, that the determination of the question of title to the sum of 2800*l.* turned upon the distinction between power and property, and that although the exercise of the power after the dissolution of her marriage created property, yet during the coverture all that the applicant had was a power of appointment over the fund, and, a power not being within the scope of the covenant, the sum of 2800*l.* belonged to her absolutely.

Townshend v. *Harrowby*, (1858) 27 L. J. (Ch.) 553; 4 Jur. (N.S.) 353, followed.

Bower v. *Smith*, (1871) L. R. 11 Eq. 279, and *In re Lord Gerard*, (1888) 58 L. T. 800, commented upon.

Steward v. *Poppleton*, [1877] W. N. 29, and *In re O'Connell*, [1903] 2 Ch. 574, not followed.

On the second question:—*Held*, adopting the view taken of the nature of the bonus in *In re Lady Annaly's Trust*, (1904) 92 L. T. 13, and *In re Power's Estate*, [1907] 1 I. R. 51, that the bonus was not merely a by-product of the applicant's life estate, but was an interest in the settled hereditaments accruing to her when the Irish Land Act, 1903, interpreted by the Irish Land Act, 1904, came into operation on November 1, 1903, and that the bonus was caught by the covenant and must be retained by the trustees of the voluntary settlement. TREMAYNE *v.* RASHLEIGH – – **Eve J. 681**

3. —— *Estate Tail—Disentailing Assurance—Protector—Three Persons appointed by Settlor—Death of Two—Power to appoint New Protector—Power not exercised—Consent of surviving Protector—Fines and Recoveries Act*, 1833 (3 & 4 *Will.* 4, *s.* 74), *ss.* 22, 32.

Where two or more protectors of a settlement are appointed by the settlor under the Fines and Recoveries Act, 1833, with no provision for appointing successors and no reference to survivorship, prima facie the office of protector survives; and a power in the settlement to appoint protectors to fill up vacancies "to the intent that the protectorship may be kept up to the original number" is not sufficient to negative the presumption of survivorship in the event of the power not being exercised.

Bell v. *Holtby*, (1873) L. R. 15 Eq. 178, approved. *In re* BAYLEY-WORTHINGTON AND COHEN'S CONTRACT – – – – **C. A. 26**

4. —— *Real Estate—Trust for Conversion at future Date—Failure of Objects—Date at which such Failure to be determined—Resulting Trust—Re-conversion—Will—Election—Estate Duty—Incidence.*

By a marriage settlement real estates in L. were conveyed by a settlor to trustees, upon

SETTLEMENT—*continued.*

trust, after the death of the survivor of his parents and of himself, to sell the same, and to hold the proceeds for certain specified purposes for the benefit of his wife and children, with an ultimate trust for the settlor, his executors, administrators and assigns. All the purposes for which the conversion was directed eventually failed:—

Held, that the real estates at L. were nevertheless impressed with the character of personalty from the day of the execution of the settlement, that being the material date whereon to determine whether the purposes for which conversion was directed had failed.

Clarke v. *Franklin*, (1858) 4 K. & J. 257, followed.

Ripley v. *Waterworth*, (1802) 7 Ves. 425, discussed.

By his will made in the lifetime of his wife the settlor devised and appointed his "interests in the estates in L." under his marriage settlement to "my successor as Lord G. in fee." And by one out of many codicils, made after the death of his wife without ever having had any children, he appointed "my L. estates" to his nephew, who, in fact, succeeded him as Lord G.:—

Held, that the testamentary dispositions of the testator effected a reconversion of the property from personalty into realty, since, at the moment of his death, he was in a position to elect, and had in fact elected, that the property should devolve as realty; and therefore the estate duty payable in respect of the L. estates was properly payable by Lord G. *In re* LORD GRIMTHORPE. BECKETT *v.* LORD GRIMTHORPE **Eve J. 666**

—— Settled land.
See under SETTLED LAND.

SEWERS—Construction of—"Special expenses" — Judgment for arrears of rates — Retrospective rate — Mandamus — Judicial discretion – – – **222**
See RATES.

SHAREHOLDERS AND SHARES—Company.
See under COMPANY.

SHIPPING—Bankruptcy — Secured creditors—Shares in ships — Vendor's lien — Admission of proof – – – **780**
See BANKRUPTCY.

SMOKE—Party-wall—Damage by smoke – **630**
See EASEMENT.

SOLICITOR — *Accounts — Solicitor and Client — Solicitor - Mortgagee — Settled Accounts — Overcharges — Opening Settled Accounts — Limitation Act*, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3.

K. was a builder, and from 1883 to 1904 employed C. as his solicitor, who financed him in numerous transactions. No bills of costs were delivered, but from time to time accounts were stated between them and the amount due for loans, interest and costs was agreed, and C. took mortgages for the agreed amounts. By 1904 all the mortgages, except two, had been paid off, either by sales or by K. paying off and taking reconveyances of the mortgages, and on each

SOLICITOR—*continued.*

occasion the amount due was agreed. In 1905 C. died, and in 1906 his executors brought an action against K. to enforce the two subsisting mortgages. K. counter-claimed for an account of all the transactions and dealings between himself and C. from 1883, alleging (as the fact was) that he had no independent advice, and in some of the settled accounts but one had been agreed more than six years before the date of his counter-claim. CHEESE *v.* KEEN – – – – **Neville J. 245**

2. —— *Costs — Taxation — Solicitor and Client Costs—Counsel employed against Client's Instructions—Rules as to Employing Counsel*, 1892, *r.* 20.

A solicitor cannot rely upon the Rules, as to employing counsel, of 1892, so as to justify himself, as between himself and the client, in employing particular counsel contrary to the express instructions of the client; and if counsel is employed in defiance of the client's instructions, although under r. 20 he may as a matter of etiquette be entitled to a brief at the trial by reason of his having advised during the progress of an action on behalf of the client, his fees and the costs incidental to his employment will be disallowed on taxation. *In re* HARRISSON **Parker J. 282**

3. —— *Costs — Vendor and Purchaser—Scale Fee—Leases—Deducing one Title on several Contracts—Solicitors Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *s.* 4—*General Order, Sched. I., Part I., r.* 8.

Five leases of five separate houses were granted by the same lessors on the same day to the same lessee, to whom each lease gave an option of purchasing the fee simple, in which case he was to pay all legal and other expenses of the lessors as vendors, it being stated that the intention of the parties was that the lessors should be put to no expense in respect of the conveyance.

The lessee by one letter exercised each of the five options, received only one abstract of title, and required only one conveyance of all the five houses. The 'vendors' solicitors declined to allow all the houses to be conveyed by one deed except on the terms that they should not be deprived of any part of the costs under the leases, and claimed to charge in respect of each house the scale fee for "deducing title and perusing and completing conveyance":—

Held that, as there had only been one deducing of title, a scale fee in respect of each house could not be charged. *In re* SIMMONS' CONTRACT – – – – **Parker J. 452**

SPECIFIC DEVISE—Complete general description—Falsa demonstratio – – **185**
See WILL. 11.

STATUTES:—

1623.

21 Jac. 1, c. 16, s. 2—*Limitations* – – **245**
See SOLICITOR. 1.

1670.

22 & 23 Car. 2, c. 10, s. 5—*Statute of Distributions* **71**
See WILL. 4.

1774.

14 Geo. 3, c. 78, s. 83—*Fires Prevention—Metropolis* – – – – – – **887**
See INSURANCE (FIRE).

1817.

57 Geo. 3, c. xxix., s. 52—*Michael Angelo Taylor's Act* – – – – – – **13**
See LONDON. 2.

1830.

11 Geo. 4 & 1 Will. 4, c. 40, s. 1—*Executors* **71**
See WILL. 4.

1832.

2 & 3 Will. 4, c. 71, ss. 3, 4—*Prescription* **167**
See LIGHT.

1833.

3 & 4 Will. 4, c. 27, s. 34—*Real Property Limitation* – – – – – – **34**
See LIMITATIONS, STATUTE OF.

3 & 4 Will. 4, c. 74, ss. 22, 32—*Fines and Recoveries*– – – – – **20**
See SETTLEMENT. 3.

—— —— s. 77 – – – – – **303**
See HUSBAND AND WIFE. 1.

1837.

1 Vict. c. 26, ss. 1, 9, 10—*Wills* – – **402**
See POWER.

—— —— s. 10 – – – – – **560**
See POWER OF APPOINTMENT. 1.

1842.

5 & 6 Vict. c. 45, ss. 11, 20—*Copyright* – **443**
See COPYRIGHT. 2.

1844.

7 & 8 Vict. c. 12, ss. 5, 6—*International Copyright* **443**
See COPYRIGHT. 2.

1845.

8 & 9 Vict. c. 18, ss. 82, 83—*Lands Clauses* **493**
See LANDS CLAUSES ACTS.

1854.

17 & 18 Vict. c. 113, s. 1—*Real Estate Charges (Locke King's Act)* – – – **839**
See WILL. 8.

1858.

21 & 22 Vict. c. 95, s. 16—*Court of Probate* **180**
See TRUSTEE. 1.

STATUTES—*continued.*

1860.

23 & 24 Vict. c. 145, s. 27—*Lord Cranworth's Act* *See* TRUSTEE. 1. **180**

1861.

24 & 25 Vict. c. 114— *Wills—Lord Kingsdown's Act* – – – – – – **560**
See POWER OF APPOINTMENT. 1.

1862.

25 & 26 Vict. c. 68, ss. 1, 4, 9, 11—*Fine Arts Copyright* – – – – – **433**
See COPYRIGHT. 1.
25 & 26 Vict. c. 89, ss. 25, 30, 35—*Companies* *See* COMPANY. 8. **415**
—— —— s. 38, sub-s. 4 ; s. 161 – – **743**
See COMPANY. 7.
—— —— ss. 138, 141 – – – – **589**
See COMPANY. 12.

1870.

33 & 34 Vict. c. 71, ss. 22, 66—*National Debt* *See* BANK OF ENGLAND. **290**

1874.

37 & 38 Vict. 42, s. 43—*Building Societies* **866**
See MORTGAGE. 1.
37 & 38 Vict. c. 57, s. 8—*Real Property Limitation* – – – – – – **34**
See LIMITATIONS, STATUTE OF.

1875.

38 & 39 Vict. c. 55, ss. 28, 229, 230—*Public Health* – – – – – **222**
See RATES.
38 & 39 Vict. c. 77, s. 10—*Judicature* – **804**
See ADMINISTRATION. 1.

1881.

44 & 45 Vict. c. 41, s. 30—*Conveyancing and Law of Property* – – – – **123**
See TRUSTEE. 3.
—— —— ss. 31, 71 – – – – **180**
See TRUSTEE. 1.
—— —— s. 42 – – – – – **887**
See INSURANCE (FIRE).
44 & 45 Vict. c. 44, s. 4 ; General Order, Sched. I., Part I., r. 8—*Solicitors Remuneration* – – – – – – **452**
See SOLICITOR. 3.

1882.

45 & 46 Vict. c. 38, s. 2, sub-s. 1 ; s. 56, sub-ss. 1, 2 —*Settled Land* – – – – **812**
See SETTLED LAND. 3.
—— —— s. 20, sub-s. 2 ; s. 50 – – – **213**
See SETTLED LAND. 4.
—— —— s. 53 ; s. 56, sub-s. 2 – – – **110**
See SETTLED LAND. 5.
45 & 46 Vict. c. 40, ss. 1, 2—*Copyright—Musical Compositions* – – – – **443**
See COPYRIGHT. 2.
45 & 46 Vict. c. 50, s. 233 ; Sched. II., r. 5— *Municipal Corporations* – – **457**
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1883.

46 & 47 Vict. c. 52, s. 38—*Bankruptcy* – **804**
See ADMINISTRATION. 1.
46 & 47 Vict. c. 57, ss. 47, 48, 60—*Patents, Designs, and Trade Marks* – – **433**
See COPYRIGHT. 1.
—— —— s. 64 – – – – – **513**
See TRADE MARK. 2.

1884.

47 & 48 Vict. c. 61, s. 14—*Judicature* – **290**
See BANK OF ENGLAND.

1886.

49 & 50 Vict. c. 33, ss. 4, 6—*International Copyright* – – – – – **443**
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1888.

51 & 52 Vict. c. 17, s. 3—*Copyright—Musical Compositions* – – – – **443**
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53 & 54 Vict. c. 5, s. 98, sub-s. 2 ; s. 109, sub-s. 3—*Lunacy* – – – **201**
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53 & 54 Vict. c. 69, s. 10—*Settled Land* – **593**
See SETTLED LAND. 6.

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55 & 56 Vict. c. 13, s. 3 — *Conveyancing and Law of Property* – – – **10**
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55 & 56 Vict. c. cviii., s. 4—*Pontypridd Waterworks* – – – – – **388**
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56 & 57 Vict. c. 53, s. 10—*Trustees* – – **180**
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56 & 57 Vict. c. 63, s. 1—*Married Women's Property* – – – – – **424**
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57 & 58 Vict. c. 30, s. 6, sub-s. 2 ; s. 8, sub-ss. 3, 4 —*Finance* – – – – **130**
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57 & 58 Vict. c. ccxiii., s. 5, sub-ss. 15, 21 ; s. 49 —*London Building* – – – **327**
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62 & 63 Vict. c. 33, s. 2, sub-s. 2—*Board of Education*— – – – – **205**
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63 & 64 Vict. c. 48, s. 14—*Companies* – **152, 279**
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3 Edw. 7, c. 37, s. 48—*Irish Land* – – **681**
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4 Edw. 7, c. 34, ss. 3, 4—*Irish Land* – **681**
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5 Edw. 7, c. 15, ss. 3, 8, 9—*Trade Marks* – **197**
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7 Edw. 7, c. 29, ss. 22, 23, 92, sub-s. 2—*Patents and Designs* – – – – **847**
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7 Edw. 7, c. 50, s. 15—*Companies* – – **621**
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STOCK EXCHANGE—Pledge of shares by broker with jobber against settling day—Liability of jobber to account as mortgagee – – – – – **254**
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STREETS—Tramway—Footway—Dedication to public—Road authority—Powers—Widening of roadway—Narrowing of footway – – – – – **13**
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SURRENDER—Copyholds—Title—Conditional surrender by way of mortgage—Principal and interest statute-barred—Vacating conditional surrender – – **853**
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TESTAMENTARY EXPENSES—Estate duty—Incidence—No direction to pay testamentary expenses – – – **136**
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TRADE—Action, Cause of—Special goods—Conditions of sale—Interference with contractual relation—Damage – – **335**
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—— Contract for service—Repudiation—Wrongful dismissal—Undertaking by servant not to trade within certain limits—Breach – – – – – **537**
See MASTER AND SERVANT.

TRADE MARK—*Design—Registration as Trade Mark—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 3, 8, 9.

The mere fact that a proposed trade mark is capable of being registered as a design is not a fatal objection to its registration as a trade mark. *In re* UNITED STATES PLAYING CARD COMPANY'S APPLICATION **Swinfen Eady J. 197**

2. —— *Registration—Invented Word—Fancy Word—Reference to Character and Quality of Goods—Descriptive Name—Patented Article—Patents, Designs and Trade Marks Act*, 1883 (46 *&* 47 *Vict. c.* 57), *s.* 64—*Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 3, 9, 35, 36.

In 1881 G. obtained letters patent for a pen which he called the "Cyclostyle." From 1882 onwards the pen, with its accessories, paper, ink, &c., were sold under the name of "Cyclostyle." In 1884 the word "Cyclostyle" was registered under the Patents, Designs and Trade Marks Act, 1883, in respect of stationery and apparatus for producing facsimile copies of writings and designs, including the pen and its accessories. In 1895 the patent expired. By that time the word had become well known to the public as the name of the patented article and its accessories.

On an application under s. 35 of the Trade Marks Act, 1905, to expunge the word from the Register of Trade Marks:—

Held, that the word, being at the date of its registration the name of the pen, was not a fancy word not in common use within the meaning of s. 64, sub-s. 1 (*c*), of the Act of 1883.

Held, also, that it was not an invented word, nor a word having no direct reference to the

TRADE MARK—*continued.*

character or quality of the goods within the meaning of s. 9 of the Act of 1905.

Where an article is made under a patent, the manufacturer cannot after the patent has expired claim a monopoly in the name by which the article has become exclusively known to the public.

In re Magnolia Metal Co.'s Trade Marks, [1897] 2 Ch. 371, followed.

Per Buckley L.J.: In construing s. 36 of the Trade Marks Act, 1905, the facts and the law at the date of the motion to expunge are to be considered. If on those facts and in that state of the law a trade mark, having been removed from the register, would be entitled to be replaced, the entry is not to be expunged on the ground that the mark was not registrable under the Acts in force at the date of its registration. That section does not mean that the Act of 1905 is to be applied to the facts at the date of the registration.

Decision of Neville J., [1907] 2 Ch. 478, affirmed. *In re* REGISTERED TRADE MARK NO. 37,760 OF DAVID GESTETNER - **C. A. 513**

TRAMWAY—Streets—Footway—Dedication to public—Road authority—Powers— **13**
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TRANSFER — Company—Winding-up—Contributory—Transfer of shares to escape liability—Validity—Test - - **334**
See COMPANY. 10.

—— Stock — Indemnity of Bank — Form of order - - - - - **290**
See BANK OF ENGLAND.

TRUST—Resulting trust—Real estate—Copyholds—Descent—Customary or common law heir - - - - - **655**
See WILL. 7.

—— Resulting trust — Re-conversion — Will — Election—Estate duty—Incidence **666**
See SETTLEMENT. 4.

TRUSTEE — *Appointment of New Trustees — "Acting Executor of the last surviving Trustee" —"Personal Representative"—Appointment by One of Three Executors, the other Two not having proved—Lord Cranworth's Act*, 1860 (23 *&* 24 *Vict. c.* 145), *s.* 27—*Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *ss.* 31, 71—*Trustee Act*, 1893 (56 *&* 57 *Vict. c.* 53), *s.* 10 —*Court of Probate Act*, 1858 (21 *&* 22 *Vict. c.* 95), *s.* 16.

H. R. B., by his will dated in 1875, devised his real estate to trustees to certain uses. The will contained no power of appointing new trustees, but in effect referred to the powers given by Lord Cranworth's Act. H. R. B. died in 1877. The last surviving trustee died in 1888, having by his will appointed three executors. Probate was granted to one only, power to prove being reserved to the other two. In 1894 the proving executor, in exercise of the power given to him by the Trustee Act, 1893, and of every other power enabling him, appointed

TRUSTEE—*continued.*

new trustees of H. R. B.'s will. The other two executors were alive at the date of this appointment, but died without having taken probate:—

Held that, having regard to the saving clause in s. 71 of the Conveyancing Act, 1881, the appointment was good as having been made by the "acting executor" of the last surviving trustee within s. 27 of Lord Cranworth's Act.

In re Solomon and Meagher's Contract, (1889) 40 Ch. D. 508, and *In re Walker and Hughes' Contract*, (1883) 24 Ch. D. 698, followed.

Semble, also, that it was good, on the ground that under s. 16 of the Court of Probate Act, 1858, the two co-executors having died without proving the will, the representation to the testator had gone and devolved as if they had not been appointed executors. *In re* BOUCHERETT. BARNE *v.* ERSKINE - - **Joyce J. 180**

2. —— *Liability — Settled Fund — Misappropriation — Unauthorized Investment — Restoration of Capital with Interest at 5 per Cent.—Capital and Income—Claim of Capital to excess of Interest beyond Amount obtainable from authorized Investments.*

The sole trustee of a marriage settlement realized a sum of Consols which had fallen into possession and formed part of the settled funds, and in breach of trust applied the proceeds in paying off a private debt which bore interest at 5 per cent. Subsequently he restored the capital in full to the trust estate, and it was assumed that he had paid interest thereon at the rate of 5 per cent. to the tenant for life under the settlement, who made no claim against him:—

Held, that the persons entitled under the settlement to the fund in remainder were not entitled, as against the tenant for life, to attribute to capital the excess of interest over the amount which would have been produced if the fund had been invested in authorized securities, and that the trustee had completely discharged himself.

Stroud v. *Gwyer*, (1860) 28 Beav. 130, followed and approved. SLADE *v.* CHAINE - **C. A. 522**

3. —— *"Persons who are the Trustees of the Will of A."—Executors of last surviving Trustee —Last surviving Trustee appointed after A.'s Death—Will—Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 30.

W. by her will devised and bequeathed property to the person or persons who should at her death be trustees of her father's will. At her death all the trustees of her father's will and all the trustees appointed in their place were dead. The executors of the last survivor of the trustees so appointed had acted in the trusts of her father's will:—

Held, that these were at her death trustees of her father's will, and were duly appointed trustees of her own.

Ockleston v. *Heap*, (1847) 1 De G. & Sm. 640, *held* to have been overruled by *Hall* v. *May*, (1857) 3 K. & J. 585, and not followed. *In re* WAIDANIS. RIVERS *v.* WAIDANIS.
Swinfen Eady J. 123

TRUSTEE—*continued.*

—— Breach of trust alleged in pleadings—Breach made good after issue of writ—Removal of trustees, Grounds for— **789**
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—— Director's remuneration — Qualification shares received as trustee—Liability of director to account to cestui que trust for remuneration – – – **65**
See COMPANY. 5.

—— Insurance—Heirlooms—Power of trustees to insure heirlooms and pay premiums out of income of capital moneys – **821**
See SETTLED LAND. 1.

—— Insurance—Rebuilding after fire—Title to and application of policy moneys—Settled land – – – – **887**
See INSURANCE (FIRE).

—— Settled land—Powers exercisable by trustees—Conflict of powers—Consent of tenant for life – – – – – **812**
See SETTLED LAND. 3.

ULTRA VIRES — Company — Reconstruction—Distribution of consideration – **743**
See COMPANY. 1.

—— Company—Special resolution — Notice—Sufficiency—Action by shareholders—Right to sue – – – – **84**
See COMPANY. 9.

—— Water company—Powers—Special Act—Sinking well — Erecting pumping station – – – – – **727**
See WATER COMPANY.

UNCERTAINTY—Gift—Charitable or emigration uses – – – – – – **488**
See CHARITY. 2.

UNDERTAKING—Contract of service—Wrongful dismissal—Undertaking by servant not to trade within certain limits—Breach – – – – – **537**
See MASTER AND SERVANT.

VENDOR AND PURCHASER—*Copyholds—Title—Conditional Surrender by way of Mortgage—Principal and Interest Statute-barred—Conditions of Sale—Vacating conditional Surrender.*

Copyholds were sold with a condition that "no evidence shall be required of the payment or discharge of any legacy or sum of money charged on the property which became payable twelve years or upwards prior to the day of sale." The court rolls contained an entry of a conditional surrender by way of mortgage made in 1865 by the predecessor in title of the vendors. The mortgagee had not been admitted, and no payment or acknowledgment in respect of either principal or interest had been made for more than twelve years prior to the day of sale :—

Held, that the condition precluded the purchaser from requiring the conditional surrender to be vacated by satisfaction being entered on the court rolls in the usual way. HOPKINSON *v.* CHAMBERLAIN – – **Neville J. 853**

VENDOR AND PURCHASER—*continued.*

—— Costs—Scale fee—Leases—Deducing one title on several contracts – **452**
See SOLICITOR. 3.

—— Receiver—Partition action—Sale by mortgagee—Purchase by receiver without leave of the Court – – – **546**
See RECEIVER.

—— Will—Mortgage—Option to purchase — Devisee — Real Estate Charges Act, 1854 – – – – – **939**
See WILL. 8.

VOLUNTARY LIQUIDATOR — Removal of—Practice – – – – – **589**
See COMPANY. 12.

VOLUNTARY SETTLEMENT.
See under SETTLEMENT.

VOLUNTARY WINDING-UP—Company – **765**
See COMPANY. 11.

WALL—Party-wall——Damage by smoke **630**
See EASEMENT.

WATER—*Water Supply—Local Government—Urban Authority — Waterworks Company — Special Act—Provisions for Protection of Urban Authority—Action by Urban Authority to enforce—Joinder of Attorney-General—Necessity for—Amendment—Terms—Pontypridd Waterworks Act*, 1892 (55 & 56 *Vict. c. cviii.*), *s.* 4.

By the Pontypridd Waterworks Act, 1892 (55 & 56 Vict. c. cviii.), s. 4, the defendant company were authorized to make and maintain a reservoir and certain filter beds, service tanks, conduits or lines of pipes and other works in the county of Glamorgan therein mentioned. Sect. 10 provided that if the works authorized were not completed within the time thereby limited the powers of the defendant company should cease, "Provided that for the protection of the Pontypridd and Ystradyfodwg Local Boards . . . . the following provisions shall have effect (namely)"; and then followed provisions imposing certain obligations upon the defendant company with reference to the quantity and quality of the water to be supplied to the districts of the two local boards.

On September 13, 1906, the plaintiff council, who were the successors in interest of the Ystradyfodwg Local Board, commenced an action in their own name against the defendant company to enforce by mandatory injunctions the provisions of s. 10. The defendant company by their defence alleged (inter alia) that they would object that the plaintiff council's statement of claim disclosed no cause of action. On November 6, 1907, after notice of trial had been given, the plaintiff council obtained an order giving them liberty to amend their writ and

WATER—*continued.*

statement of claim by adding the Attorney-General as a co-plaintiff on their relation. The order provided that "all questions as to the terms upon which such amendments ought to be allowed be left to the judge at the trial of this action, when the defendants are to be at liberty to raise such preliminary objections as they may think fit." The Attorney-General was accordingly added as a co-plaintiff :—

Held, that s. 10 of the defendant company's Act did not confer upon the plaintiff council any statutory power to sue in their own name, and that the only person who could sue was the Attorney-General.

Devonport Corporation v. *Tozer*, [1903] 1 Ch. 759, followed.

Held, also, that the liberty given to amend by the order of November 6 must be upon the terms that the plaintiff council should pay to the defendant company their costs of the action up to and including that order, and that the Attorney-General should only be entitled to such relief as he could have claimed if the action had been commenced at the date on which he was added as a party.

Ayscough v. *Bullar*, (1889) 41 Ch. D. 341, applied. ATTORNEY-GENERAL (ON THE RELATION OF THE RHONDDA URBAN DISTRICT COUNCIL) AND THE RHONDDA URBAN DISTRICT COUNCIL *v.* PONTYPRIDD WATERWORKS COMPANY – – – **Warrington J. 388**

WATER COMPANY—*Powers—Special Act — Purchase of Land by Agreement—Sinking Well —Erecting Pumping Station—Ultra vires.*

A water company incorporated by a special Act for the purposes of making and maintaining the waterworks thereby limited and defined, and for supplying water within the limits of the Act and for carrying on the business usually carried on by water companies, was empowered, in addition to the lands authorized to be taken compulsorily, to acquire by agreement and hold for the general purposes of its undertaking any lands within its limits of supply not exceeding a certain acreage, provided that no buildings should be erected thereon, except such as were required for the purposes of the company's waterworks. Under this power the company purchased land some distance away from its waterworks and proposed to sink a well and erect a pumping station thereon for the purpose of tapping a new water supply and pumping the water into an existing reservoir constructed under the powers of the Act :—

Held, that the power to purchase additional land was only for purposes ancillary to the main purpose of the company, which was to supply water within its limits of supply by its statutory waterworks, and that the proposed works were ultra vires. ATTORNEY-GENERAL *v.* FRIMLEY AND FARNBOROUGH DISTRICT WATER COMPANY **C. A. 727**

WELL — Water company — Powers — Sinking well — Erecting pumping station — Ultra vires – – – – **727**
See WATER COMPANY.

"**WIDOW**" — Will — Construction — Bigamous marriage — Secondary meaning of "widow" – – – – **162**
See WIDOW. 15.

WIFE—Husband and.
See under HUSBAND AND WIFE.

WILL—*Advances—Interest, Rate of—Hotchpot — Share of Residue — Advances in Testator's Lifetime.*

The general rule of the Court that interest must be calculated at 4 per cent. has not been altered. Interest on advances which have to be brought into hotchpot must still be paid at that rate.

Semble, the same rule does not apply to calculations of interest in cases between tenant for life and remainderman, such as arose in *In re Earl of Chesterfield's Trusts*, (1883) 24 Ch. D. 643, or *Brown* v. *Gellatly*, (1866) L. R. 2 Ch. 751. *In re* DAVY. HOLLINGSWORTH *v.* DAVY **C. A. 61**

2. —— *Class—Bequest to a Class of Children "born" previously to date of Will—Child en ventre sa mère—Will—Construction.*

There is a general rule of construction that, in the absence of a contrary intention, a gift by will to children "living" or "born" at a given period includes a child en ventre sa mère at that date, and born afterwards, in any case where the application of the rule is for the benefit of the child.

A testator, by his will, gave to each of his great-nephews and great-nieces "born previously to the date of this my will," to whom no other pecuniary bequest was given by his will or any codicil thereto, the sum of 500*l.*, and he made two codicils to his will :—

Held—that a great-niece en ventre sa mère at the date of the will and of the codicils and born afterwards was entitled to a legacy.

Decision of Kekewich J., [1907] 2 Ch. 46, reversed on this point. *In re* SALAMAN. DE PASS *v.* SONNENTHAL – – – **C. A. 4**

3. —— *Condition — Forfeiture — Entering Naval or Military Services—Invalidity—Public Policy.*

A condition divesting the interest of a devisee or legatee if he enters into the naval or military services of the country is void as against public policy. *In re* BEARD. REVERSIONARY AND GENERAL SECURITIES COMPANY, LIMITED *v.* HALL. *In re* BEARD. BEARD *v.* HALL **Swinfen Eady J. 383**

4. —— *Executors — Gift of Residue—Express Trust—Advancements to Children by Testator—Partial Intestacy—Next of Kin—Hotchpot—Statute of Distributions* (22 *&* 23 *Car.* 2, *c.* 10), *s.* 5—*Executors Act*, 1830 (11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 40), *s.* 1.

In applying the analogy of the Statute of Distributions to the case of a partial intestacy of the beneficial interest in undisposed-of residue, the rule of equity still is that advances made by the testator in his lifetime need not be brought into hotchpot.

WILL—*continued.*

Vachell v. *Jeffereys*, (1701) Prec. Ch. 170; *Wheeler* v. *Sheer*, (1730) Mos. 301; and *Cowper* v. *Scott*, (1731) 3 P. Wms. 119, examined and followed.

The Executors Act, 1830, only applies in cases where there is a bare appointment of executors, so that the implication of law has to be resorted to in order to see whether the estate of the testator not otherwise disposed of vests in them beneficially virtute officii.

Williams v. *Arkle*, (1875) L. R. 7 H. L. 606, applied.

Decision of Neville J., [1907] 2 Ch. 84, affirmed. *In re* ROBY. HOWLETT *v.* NEWINGTON **C. A. 71**

5. —— *Executors—No Next of Kin—Residue undisposed of—Beneficial Title of Executors—Equal pecuniary Legacies to all — Unequal specific Legacies to some — Presumption of Intention—Will—Construction.*

In a case where there are no next of kin, the executors are beneficially entitled to the undisposed-of residuary personal estate, unless the will shews a contrary intention. It is settled law that such an intention will be inferred from the gift of a pecuniary legacy to a sole executor, or of equal pecuniary legacies to all the executors, but when once there is inequality, whether in respect of pecuniary legacies or in respect of specific legacies, then there is no presumption of a contrary intention sufficient to displace the legal title of the executors, and they will take the residue beneficially.

Decision of Swinfen Eady J., [1907] 1 Ch. 171, reversed. *In re* GLUKMAN. ATTORNEY-GENERAL *v.* JEFFERYS – – – **C. A. 552**

6. —— *Legacy — Forfeiture Condition — Codicil—Substituted settled Legacy—Incidents of original Legacy applicable—Will—Construction.*

A settled legacy substituted by a codicil for an absolute legacy given by the will is subject to all the conditions and incidents of the original legacy, even where the different quality of the original and substituted bequests renders the operation of a defeasance clause applicable to the original legacy more onerous in the case of the substituted legacy. *In re* JOSEPH. PAIN *v.* JOSEPH – – – – – **Eve J. 599**

7. —— *Intestacy—Real Estate—Copyholds—Equitable Interest—Resulting Trust—Descent—Customary or Common Law Heir.*

Where a testator has died intestate as to copyholds, held under an implied or resulting trust for him, and there is no special custom of the manor confining the custom of descent to a tenant on the rolls, or to a tenant dying seised, the equitable interest in the copyholds will descend, as the legal estate would have descended, to the customary heirs, and not to the common law heir, of the intestate.

Trash v. *Wood*, (1839) 4 My. & Cr. 324, applied. *In re* HUDSON. CASSELS *v.* HUDSON **Eve J. 655**

WILL—*continued.*

8. —— *Mortgage — Land subject to Incumbrances — Option to Purchase — Interest of Donee of Right of Pre-exemption — Devisee — Person claiming through the deceased Person—Vendor and Purchaser—Real Estate Charges Act*, 1854 (*Locke King's Act*) (17 & 18 *Vict. c.* 113), *s.* 1.

The testator devised and bequeathed his residuary real and personal estate to trustees upon trust for sale and conversion, and directed that they should allow his son the option of purchasing two houses forming part of his real estate for 450*l*. The two houses were subject to a mortgage for 300*l*. The son gave notice to the trustees of his intention to exercise the option, and took out a summons to determine whether the option gave him the right to a conveyance free from incumbrances:—

Held (following *Given* v. *Massey*, (1892) 31 L. R. Ir. 126), that the son was not an heir or devisee, and therefore s. 1 of the Real Estate Charges Act, 1854 (Locke King's Act), did not apply, and he was entitled to have the property conveyed to him free from the mortgage. *In re* WILSON. WILSON *v.* WILSON **Warrington J. 839**

9. —— *Residue—Gift of Residue to A., B., and the "Six Children now living" of C.—All but one of C.'s Children dead at Date of Will—Presumption of Mistake—Rejection of specified Number—Residue divisible amongst A., B., and surviving Child—Will—Construction.*

A testator gave the residue of his estate to his trustees upon trust for certain named persons and the six children of the late S. F. O. in equal shares as tenants in common. By a codicil the testator explained that by "the six children of the late S. F. O." he meant and intended to benefit "the six children now living of the said S. F. O. by his first wife E. O. formerly E. S. and no others." At the date of the will five of the six children of S. F. O. by E. O. were dead, the last of the five to die being referred to by the testator in his will as "my late niece S. M." The survivor of the six was the defendant E. P.:—

Held, that the children referred to in the will and codicil were the living children of S. F. O. by E. O.; that the Court would reject the specified number "six" on the ground of presumption of mistake; and that the residue was divisible equally amongst the specifically named legatees and E. P.

The principle upon which *Garvey* v. *Hibbert*, (1812) 19 Ves. 125, was decided applied to the converse case where the number of the children in existence is less than that specified in the will. *In re* SHARP. MADDISON *v.* GILL **Joyce J. 372**

10. —— *Residue, Shares of — Advances in Lifetime of Testator — Subsequent authorized Advances by Trustees — Hotchpot — Power to postpone Conversion—Principle for ascertaining Income pending distribution — Will — Construction.*

A testator by his will gave his residuary real and personal estate to trustees upon trust to sell

and convert and to divide the proceeds into fifteen equal shares, and to distribute them among his eight children as therein mentioned, the daughters' shares and portions of the sons' shares being settled. And the testator declared that for the purpose of ascertaining the shares certain advances of varying amounts which he had made to some of his children and certain payments which he authorized his trustees to make after his death should (with interest at 4 per cent. in certain cases from the date of his death or from the date of payment as the case might be) be debited against the shares of the children so advanced. And he gave wide powers to his trustees to postpone the conversion of his estate, and directed that the actual intermediate income should be paid to the tenants for life. The estate of the testator at his death in 1901 consisted largely of shares in companies, the dividends on which, as also the capital value, had been subject to great fluctuations :—

Held, that for the purpose of dividing the income pending the division of the capital of the estate interest at 4 per cent. ought, in cases where the testator had directed that such interest should be debited, to be added to the actual income for the time being, and the aggregate so arrived at ought to be divided into fifteen shares and distributed among the children, subject in the case of each advanced child to a deduction of the interest on his advance or on the payment made to him.

In re Hargreaves, (1903) 88 L. T. 100, explained and distinguished. *In re* POYSER. LANDON *v.* POYSER – **Warrington J. 828**

11. —— *Specific Devise — Complete general Description—Subsequent imperfect Examination —Falsa demonstratio—Will—Construction.*

The testatrix, by her will dated in 1888, devised the real estate to which she became entitled under a codicil to her father's will, "namely, the residence known as Orford House, in the parish of Oakley, in the county of Essex, and lands and hereditaments" (in certain parishes) "in the same county" to her sister for life, with remainder over, and she then disposed of her residue. In addition to the real estate specifically named by the testatrix as passing to her under the father's codicil, there was, in fact, a freehold in London, to which she was also thus entitled. There was no evidence whether she knew that it formed part of the property passing under the codicil :—

Held, that the specification by name and locality introduced by the word "namely" was not merely an imperfect enumeration of the properties intended to be devised, but formed the leading description, and consequently that the freehold in London did not pass by the specific devise, but fell into residue.

West v. *Lawday*, (1865) 11 H. L. C. 375, considered. *In re* BROCKET. DAWES *v.* MILLER – – – – – **Joyce J. 185**

12. "*Surviving Children and their respective Issue*"*—Alternative Original Gift of Personalty*

—Issue Competing with Parents—Will—Construction.

Although in a gift of real estate to A. and his issue the word "issue" is prima facie a word of limitation, there is no like rule of construction as regards gifts of personal property, in which case it is a question of construction on each particular instrument. Such words as "and their issue" or "and their respective issue" may be read as meaning either an alternative substitutional gift or an alternative original gift.

A testator died in 1884, having then seven children. By his will he directed the income of his real and personal estate to be divided into seven equal parts, and each one-seventh to be paid to a child. The testator appointed two of his sons executors and trustees, and directed that on the death of either executor the survivor should "sell the whole of my real and personal estate and cause the same to be equally divided amongst my then surviving children and their respective issue."

One son and executor died in 1907 without leaving issue. Two children of the testator died between 1884 and 1907 leaving children who survived the deceased executor. Other children survived the deceased executor and had children living :—

Held, that the estate was divisible into as many shares as there were children of the testator who either survived the deceased executor or died before him leaving issue who so survived; that each surviving child of the testator took one share (his own issue not being allowed to compete with him); and that the surviving children of each child of the testator who predeceased the deceased executor took the share which their deceased parent would have taken had he survived that executor. *In re* COULDEN. COULDEN *v.* COULDEN – – **Parker J. 320**

13. —— *Testamentary Expenses — Estate Duty—Incidence—General Power of Appointment by Will — Appointment — Residue — No Direction to pay Testamentary Expenses — Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 8, *sub-s* 3; *s.* 9, *sub-s.* 1.

Where a testator, in the exercise of a general testamentary power, appoints personal property, the estate duty payable in respect of the appointed property is not payable out of that property, but out of the general personal estate of the testator.

In re Moore, [1901] 1 Ch. 691, and *In re Fearnsides*, [1903] 1 Ch. 250, followed.

In re Treasure, [1900] 2 Ch. 648; *In re Power*, [1901] 2 Ch. 659; and *In re Dodson*, [1907] 1 Ch. 284, dissented from. *In re* ORLEBAR. WYNTER *v.* ORLEBAR – **Neville J. 136**

14. —— *Testamentary Expenses—Legacies—Direction to Pay—Mixed Fund—Rateable Payment—Portion attributable to Realty—Estate Duty—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 6, *sub-s.* 2; *s.* 8, *sub-ss.* 3, 4.

A general direction to pay legacies out of a mixed fund of residue charges them rateably on

WILL—*continued.*

the portions attributable to realty and personalty.

Roberts v. *Walker*, (1830) 1 Russ. & My. 752, and *Allan* v. *Gott*, (1872) L. R. 7 Ch. 439, applied.

So far as the legacies are payable out of the portion attributable to realty they are real estate and must bear their own estate duty, notwithstanding a direction to pay "testamentary expenses" out of the mixed fund.

Smith v. *Claxton*, (1820) 4 Madd. 484; *In re Sharman*, [1901] 2 Ch. 280; and *Berry* v. *Gaukroger*, [1903] 2 Ch. 116, applied.

In re Trenchard, [1905] 1 Ch. 82, distinguished. *In re* SPENCER COOPER. POE *v.* SPENCER COOPER – **Swinfen Eady J. 130**

15. —— *Widow — Administration — Life Interest to Wife "if she shall so long continue my Widow" — Bigamous Marriage — Secondary Meaning of "Widow"—Will—Construction.*

A testator gave all his furniture, household goods and effects to his "dear wife D. J. Wagstaff"; and after various pecuniary legacies devised and bequeathed the residue of his real and personal estate to his "said wife" and two other persons upon trust for sale and to invest and pay the interest and annual produce thereof to "my said wife during her life if she shall so long continue my widow," and after her decease or second marriage, upon trust, in the events which happened, for the plaintiff. The lady whom the testator thus described as his "wife," and with whom he went through the ceremony of marriage in 1893, was at that time the wife of A. G. Jalland, to whom she had been married in 1884, and who was still living:—

Held, on the evidence, that the testator knew at the time he went through the ceremony of marriage that the lady was then the wife of A. G. Jalland, and, consequently, that upon the true construction of this will she was entitled to a life interest in the residuary estate unless and until she contracted a marriage subsequent to the death of the testator.

Decision of Kekewich J., [1907] 2 Ch. 35, affirmed. *In re* WAGSTAFF. WAGSTAFF *v.* JALLAND – – – – – **C. A. 162**

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